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No. 07-

IN THE

Supreme Court of the United States

BICO STUPAKOFF AND RUSSELL JAMES,
Petitioners,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., AND OTTO SUMISHO INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an order approving a bankruptcy plan release and injunction, procured through constitutionally insufficient notice, may nonetheless become enforceable against parties who have not moved to enforce their rights within the "reasonable time" contemplated by Federal Rule of Civil Procedure 60(b).

PARTIES TO THE PROCEEDINGS

Petitioners are Bico Stupakoff and Russell James. Respondents are Otto (GmbH & Co KG), Otto Doosan Ltd., and Otto Sumisho Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners Bico Stupakoff and Russell James respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was entered on March 13, 2008 and is unpublished but electronically reported at 2008 WL 687230. It is reproduced at App. A. The opinion of the United States District Court for the Southern District of New York is unpublished but

electronically reported at 2007 WL 656902. It is reproduced at App. B. The opinion of the United States Bankruptcy Court for the Southern District of New York is reported at 354 B.R. 51 and is reproduced at App. C. A related opinion of the Bankruptcy Court concerning the same Chapter 11 reorganization plan is unpublished but electronically available at 2006 WL 2577825. It is reproduced at App. D.

JURISDICTION

The court of appeals issued its opinion on March 13, 2008. Petitioners did not seek a rehearing. The jurisdiction of this Court is invoked under 12 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 60 provides, in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether herertofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the

> judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based had been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.[1]

The pertinent provisions of Section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), Section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, and Federal Rules of Bankruptcy Procedure 7001 and 9024 are reproduced at App. E.

STATEMENT OF THE CASE

In a decision that diverges sharply from the established law in at least seven of the federal circuits, the court of appeals in this case affirmed the decisions below based upon the conclusion that a bankruptcy court has discretion under Rule 60(b) of the Federal Rules of Civil Procedure to deny relief to a creditor

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[1] The Petitioners are citing to the version of Federal Rule of Civil Procedure 60(b) that was in effect at the time of the underlying bankruptcy court decision. The language of Rule 60 was amended, effective December 1, 2007, "as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules." *See* FED. R. CIV. P. 60, Advisory Committee Notes, 2007 Amendments. These changes "are intended to be stylistic only." *Id.* The final sentence of the prior Rule 60(b), which was not included in the foregoing quotation, has also been deleted as "unnecessary." *Id.* "Relief continues to be available only as provided in the Civil Rules or by independent action." *Id.*

who does not seek relief from an allegedly void plan of reorganization within what the bankruptcy court believes to be a "reasonable time." *See* FED. R. CIV. P. 60(b). Petitioners are now foreclosed from challenging the enforceability of a broad release and injunction purporting to extinguish their claims against the Respondents, notwithstanding the Petitioners' contention that they did not receive constitutionally required notice. As a result, they will be unable to pursue their claims against Respondents unless this Court grants review.

The court of appeals's ruling presents a critically important question about the enforceability of an order obtained without the level of notice required by the Due Process Clause: Can an otherwise unenforceable order become enforceable against parties whose rights the order purports to extinguish because those parties did not affirmatively move to enforce their rights within the "reasonable time" contemplated by Federal Rule of Civil Procedure 60(b)? The court of appeals's ruling on this issue—and the minority position it represents—has broad consequences, particularly in the context of the growing number of Chapter 11 "mega cases," where (as in this case) plans of reorganization can impact the rights of hundreds or even thousands of creditors. This Court's review is critical to clarify the consequences of inadequate notice and to resolve the current conflict within the federal circuits on this issue.

Background

Petitioners are top-tier fashion photographers in the business of taking and licensing photographs for commercial use, including retail catalogues and websites. Petitioners granted Spiegel, Inc., a domestic

apparel retailer, a limited license for the use of certain of Petitioners' electronic images in its domestic retail catalogs and website. Petitioners continue to own the sole and exclusive copyrights in the photographs. The license did not permit Spiegel to transmit the photographs for use by any other entities.

Respondents are international apparel and merchandise retailers. Petitioners contend that, notwithstanding the limited nature of the license, Spiegel provided Petitioners' images to Respondents, who had neither a valid license nor permission to use the images. Respondents proceeded to use the photographic images in their own retail catalogs and websites in violation of Petitioners' copyrights. Because the scope and nature of the use of photographs dictates the prices users of the photographs must pay, Spiegel obtained its license for the use of Petitioners' photographs in its domestic catalog and website sales at a fraction of the cost of a license for the use of the same photographs in both domestic and international catalogs and websites. [JA208.][2]

On January 30, 2004, another photographer who had also supplied images to Spiegel, Peter Rosenbaum Photography Corporation ("Rosenbaum"), filed a lawsuit in the United States District Court for the Northern District of Illinois against Respondents (the "Illinois Litigation"), seeking to recover damages for similar copyright violations in connection with Respondents' unauthorized use of Rosenbaum's photographic images. In early November 2005, Rosenbaum sought leave from the court in the Illinois Litigation

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[2] All citations in the form "[JAxxx.]" refer to record evidence included in the Joint Appendix that was before the Second Circuit.

to amend its complaint. [Pet. App. 15a.] The proposed amendment requested certification of the Illinois Litigation as a class action on behalf of other photographers, models, photo shoot producers, photo shoot clothes stylists, and photo shoot hair and make-up artists. [JA206-7.] According to Rosenbaum's allegations, Respondents had collectively used well over a thousand photographs in which Rosenbaum and other photographers exclusively owned copyrights. [JA208-209.]

Spiegel and a number of its direct and indirect subsidiaries (collectively, the "Debtors") had previously obtained an order in the Debtors' Chapter 11 cases purporting to bar claims against Respondents related to Spiegel. In March 2005, more than a year after Rosenbaum filed the Illinois Litigation, the United States Bankruptcy Court for the Southern District of New York entered an order approving the Spiegel debtors' disclosure statement and setting a hearing on the confirmation of the Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code ("Plan"). [Pet. App. 14a.] The Plan includes sweeping a Release and Injunction, which purports to release and enjoin not only claims against the Debtors, but also all claims against Respondents, who were non-debtors, that relate to Spiegel or its affiliated co-Debtors. [Pet. App. 14a-15a.] The bankruptcy court approved this Release and Injunction in order to facilitate agreements that provided for Respondents to pay over $260 million to the debtors' estates. [Appellees' Br. 1.]

Neither Respondents nor Spiegel provided Petitioners with actual notice that they were requesting that the bankruptcy court enter a Release and Injunction

purporting to extinguish Petitioners' claims against Respondents.[3] The Bankruptcy Court confirmed the Plan on May 25, 2005, and the Plan, including the Release and Injunction, went into effect on June 21, 2005. [Pet. App. 15a.]

On November 15, 2005, shortly after Rosenbaum filed its motion to amend the Illinois Litigation, Respondent Otto (GmbH & Co KG) filed a notice of injunction in the Illinois Litigation, which asserted that the claims pled in the Illinois Litigation were barred by the Release and Injunction contained in the confirmed Plan. [Pet. App. 15a.] Although the Plan went into effect on June 21, 2005, this was the first time that the Release and Injunction had been brought to the attention of the court in the Illinois Litigation. [Pet. App. 16a.]

On November 29, 2005, the court in the Illinois Litigation denied Rosenbaum leave to amend its complaint and stayed the action until the Bankruptcy Court could rule on the enforceability and applicability of the Plan's Release and Injunction. At the hearing, the Illinois Court warned that "to actually proceed before getting permission from the Bankruptcy Court to proceed could be a . . . serious violation" of the Release and Injunction and instructed Rosenbaum to "proceed rather cautiously." *Peter Rosenbaum Photography Corp. v. Otto Doosan Mail Order, Ltd.*, No. 04 C 767 (N.D. Ill.), Hr'g Tr., Nov. 29, 2005, 7-8.

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[3] Spiegel did provide publication notice of the hearing on confirmation of the Plan containing the Release and Injunction. The Petitioners have contended in the proceedings below that, as known creditors, they were entitled to actual notice, and publication notice was insufficient for this purpose.

On April 10, 2006, Rosenbaum filed a Motion To Temporarily Lift the Stay of Proceedings for the Limited Purpose of Filing a Second Amended Class Action Complaint. On April 13, 2006, the court in the Illinois Litigation denied the motion and again directed Rosenbaum to seek relief in the Bankruptcy Court as to the enforceability and applicability of the Release and Injunction. On May 4, 2006, Rosenbaum filed a motion in the Bankruptcy Court for the Southern District of New York seeking (i) a declaration that the claims in the Illinois Litigation were not barred by the Release and Injunction; and (ii) authorization to proceed against Respondents. [JA179-80.] The Petitioners are not currently parties to the Illinois Litigation, but wish to join this litigation as parties plaintiff in the event it is determined that the Release and Injunction does not bar such action.

Proceedings Below

Based on the Illinois court's comments, Petitioners believed it would be inadvisable to initiate litigation against the Respondents without first obtaining a ruling regarding the enforceability of the Release and Injunction. Accordingly, Petitioners filed an adversary proceeding in the Bankruptcy Court on June 21, 2006 requesting a declaration that the Release and Injunction were unenforceable against them due to the lack of constitutionally adequate notice. [JA545-55.] Petitioners asserted that both Spiegel and Respondents: (i) were aware that liability had been asserted in the Illinois litigation with respect to unauthorized use of copyrighted photographs; (ii) knew or should have known that Spiegel had only a limited license for use of Petitioners' photographs; and (iii) therefore knew or should have known that the Release and Injunction in the proposed Plan granted

relief for their benefit against Petitioners. [JA549-50.] Notwithstanding their alleged actual knowledge, Respondents failed to provide Petitioners with actual notice of the proposed extinguishment of their claims prior to the confirmation of the Plan, in contravention of Petitioners' due process rights. [JA550.]

On October 5, 2006, Respondents moved to dismiss Petitioners' adversary complaint, arguing (among other things) that the complaint was subject to the time limitations of Federal Rule of Civil Procedure 60(b) and that the complaint should be dismissed pursuant to Rule 12(b)(6) because it failed to state a claim that Petitioners were known creditors entitled to actual notice. [JA742-81.]

The bankruptcy court issued an order dismissing Petitioners' adversary complaint on November 1, 2006. The order cited two independent grounds for dismissal. First, the bankruptcy court held that Petitioners had failed to state a claim that Petitioners were known creditors entitled to actual notice. [Pet. App. 22a-23a.] Second, the bankruptcy court concluded that the adversary proceeding was untimely. [Pet. App. 24a.] Although Petitioners brought their adversary proceeding as a separate declaratory judgment action pursuant to 28 U.S.C. § 2201, the bankruptcy court determined that the adversary proceeding was essentially "a collateral attack on the Plan and Confirmation Order that were approved by this Court over a year ago" and was therefore governed by Rule 60(b) of the Federal Rules of Civil Procedure. [Pet. App. 24a.] The Bankruptcy Court then found that Petitioners "have not brought their request before this Court in a reasonable time," as Rule 60(b) requires. [Pet. App. 24a.]

Petitioners appealed the bankruptcy court's order dismissing the adversary proceeding to the United States District Court for the Southern District of New York.[4] The district court affirmed based solely on the bankruptcy court's first ground for dismissal, that Petitioners had not adequately pled that they were known creditors entitled to actual notice.[5] [Pet. App.

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[4] Petitioners' appeal to the district court also addressed two other bankruptcy court rulings, neither of which is pertinent to the review requested here. First, Petitioners appealed the bankruptcy court's denial of their motion to modify the Plan for the limited purpose of allowing Petitioners to intervene in the Illinois litigation in order to preserve their rights while the adversary proceeding was resolved. Petitioners brought this motion under Rule 60(b), assuming without conceding the applicability of the Release and Injunction. The bankruptcy court denied the motion because it determined that Petitioners failed to bring it within a reasonable time. [Pet. App. 24a.] The district court and the Second Circuit Court of Appeals affirmed. [Pet. App. 3a-4a, 9a-10a.] Petitioners contend that the denial of this relief equitably tolls any statutes of limitation that may be applicable to their claims against the Respondents. Second, Petitioners appealed the bankruptcy court's order denying Rosenbaum's motion, which contained findings and defined terms broad enough to extinguish the Petitioners' claims against the Respondents. The Petitioners argued that it was error for the bankruptcy court to extinguish their claims in the context of deciding Rosenbaum's motion, especially in light of the fact that the Petitioners had not yet received a hearing on their constitutional claims. The district court held that this appeal was moot, given the affirmance of the bankruptcy court's dismissal of Petitioners' claims under Rule 12(b)(6). [Pet. App. 9a.] The court of appeals affirmed. [Pet. App. 5a.]

[5] The district court stated in a footnote that it was not necessary to review the Bankruptcy Court's holding that Petitioners declaratory judgment action was barred by Rule 60(b). [Pet. App. 9a-10a.] The court proceeded to note in dicta that it had no doubt that, even if the Bankruptcy Court had not dismissed pursuant to Rule 12(b)(6) and 60, it would have declined to

8a-9a.] Petitioners appealed the district court's decision to the United States Court of Appeals for the Second Circuit.

The court of appeals issued its ruling on March 13, 2008. That ruling affirmed the decisions of the bankruptcy court and district court solely on the basis that the request for declaratory judgment was *untimely*. [Pet. App. 3a-4a.] The court of appeals's ruling did not address or affirm any part of the district court's ruling, nor did it even mention the lower courts' finding that Petitioners' complaint failed to state a claim. Instead, the court of appeals simply held that the bankruptcy court was well within its discretion to apply the "reasonable time" limitation of Rule 60(b) to Petitioners' adversary proceeding and dismiss it as untimely:

> The Bankruptcy Court's decision to dismiss Appellants' request as untimely because it was "[e]ssentially ... a collateral attack on [the] Plan" and Appellants are "precluded from seeking to modify the Confirmation Order and Plan ... under Rule 60(b) ... [because Appellants] have not brought their request ... in a reasonable time" is well within its discretion ...

[Pet. App. 4a.]

It is this specific ruling by the court of appeals that Petitioners ask the Court to review. Petitioners contend that the court of appeals departed from fundamental principles of due process in endorsing the minority position that an action seeking relief from a

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exercise its discretion to review the claims under the Declaratory Judgment Act because of Petitioners' delay in asserting their rights. [Pet. App. 10a.]

void judgment must be brought in a reasonable time.[6] Under the rationale of the court of appeals, orders and judgments procured through constitutionally insufficient notice may nevertheless become presumptively enforceable, based upon the passage of time, and the competing equities urged by the parties. Petitioners submit that the fundamental Constitutional guarantee of Due Process of Law cannot be subject to such discretionary enforcement.

REASONS FOR GRANTING THE PETITION

The court of appeals's ruling presents a fundamental and critically important question about the consequences of failing to provide the minimum notice required under *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950): Can an otherwise unenforceable order become enforceable against parties whose rights the order purports to extinguish because those parties did not affirmatively move to enforce their rights within the "reasonable time" contemplated by Federal Rule of Civil Procedure 60(b)? Consistent with precedent in a minority of the circuits, the court of appeals held in this case that the bankruptcy court was "well within its discretion" to dismiss as untimely Petitioners' claims that the Release and Injunction is unenforceable because Peti-

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[6] As a result of this ruling and the lower courts' rulings in this case, Petitioners will be foreclosed from pursuing their copyright claims against Respondents if this Court does not grant review. Because the bankruptcy court concluded, as a matter of law, that the Petitioners were unknown creditors who received sufficient notice by publication, Petitioners have effectively been precluded from further challenging the enforceability of the Release and Injunction—whether in the Illinois litigation or another forum.

tioners did not seek relief for seven months after Respondents filed their notice of injunction.

The court of appeals's ruling abandons completely the well-established principle that a judgment or order that is void *ab initio* due to lack of constitutionally required notice is a nullity that can *never* be enforced against a party who did not receive notice. Under this principle, a void judgment "cannot acquire validity" because of laches on the part of the affected party. *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (2d ed. 1995). But this is exactly the consequence of the court of appeals's ruling here. By holding that the reasonable time limitation applies to voidness challenges—whether brought as Rule 60(b) motions or separate declaratory judgment actions—the court has precluded *any* voidness challenge beyond a reasonable time, effectively reviving the Release and Injunction and making it enforceable.

The majority of circuits continue to adhere to the contrary principle that a void judgment cannot be revived, holding unequivocally that the "reasonable time" requirement of Rule 60(b) does *not* limit the time in which affected parties can challenge the enforceability of allegedly void judgments and orders. However, the Second, Sixth, and Eighth Circuits have held that voidness challenges *are* subject to reasonable time restrictions, and the First Circuit appears recently to have joined this position. This Court should grant certiorari in order to address a clear and acknowledged division among the circuits and to insure uniformity on this important question.

This is not just a theoretical issue. The court of appeals's position has important real-world consequences, particularly in the context of the growing

number of Chapter 11 "mega cases" (such as the Spiegel bankruptcy here) in which the issue is likely to arise more and more frequently. From the perspective of creditors who did not receive notice of a judgment or order impacting their rights, the court of appeals's ruling effectively imposes a duty of diligence to go back to the bankruptcy court and seek to revoke or vacate the void order. Parties who wait for someone to attempt to enforce the void order against them, or who simply pursue their rights purportedly discharged by the void order in another forum, may find—in just a few months—that they have lost the ability to claim the order is unenforceable against them.

For debtors and others with an interest in the finality of bankruptcy court orders, the court of appeals's ruling significantly reduces the long-term threat of non-noticed creditors coming back to attack the complex settlements that are often the centerpiece of successful reorganizations in mega cases. But at the same time, the rationale of this ruling drastically reduces the impetus for debtors to ensure that they diligently ascertain the identities of creditors and get notice right the first time. Thus, the court of appeals's ruling creates a safety net that tilts the balance carefully struck in *Mullane* and its progeny—away from considerations of due process, and toward considerations of finality. Although finality is important, it cannot be at the expense of baseline due process requirements.

I. THE COURT OF APPEALS'S RULING IS CONTRARY TO WELL-ESTABLISHED PRINCIPLES OF DUE PROCESS.

As an initial matter, the court of appeals's decision warrants this Court's review because this case pre-

sents a fundamental *due process* issue. Almost six decades ago, this Court held in *Mullane* that due process requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the case." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In order to satisfy this bedrock constitutional requirement, the notice given prior to the adjudication of property rights must be "reasonably calculated under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. As the *Mullane* Court explained, the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.*

Applying the standard announced in *Mullane*, this Court has held that creditors have a constitutional right to adequate notice and the opportunity to be heard in a meaningful way in the course of bankruptcy proceedings. *See, e.g., City of New York v. New York, New Haven & Hartford R.R.*, 344 U.S. 293 (1953). Bankruptcy orders entered in contravention of a party's due process rights are void and unenforceable against the party who did not receive due process.[7] *See id.* at 296-97 (reversing an injunction against the enforcement of liens where creditor was

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[7] In the context of large plans of reorganization, the appropriate remedy for due process violations affecting creditors whose claims are small in the context of the plan as a whole will often be to hold that the claims of the improperly notified creditors are not discharged or subject to the plan, rather than revoking or vacating the plan as a whole. *See In re Westway Ford, Inc.*, 170 B.R. 101, 103 (Bankr. S.D. Tex. 1994).

not given adequate notice of the claim bar date and was therefore not barred from asserting claim following bankruptcy reorganization plan); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) (discharge of a claim without reasonable notice violates due process and renders the claim non-dischargeable; claim cannot be bound to the plan of reorganization).

Following *Mullane* and *City of New York* to their logical conclusion, circuit courts have widely adopted the principle that judgments and orders that are void *ab initio* due to lack of constitutionally required notice are a nullity and cannot be revived through the passage of time. *See, e.g., United States v. One Toshiba Color Television*, 213 F.3d 147, 157 (3d Cir. 2000) ("[N]o passage of time can transmute a nullity into a binding judgment."); *Owens-Corning Fiberglas Corp. v. Ctr. Wholesale, Inc. (In re Center Wholesale, Inc.)*, 759 F.2d 1440, 1448 (9th Cir. 1985) ("[V]oid judgment cannot acquire validity because of laches on the part of the judgment debtor.") (citing 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.9 (10th Cir. 1979) ("[I]f judgment is void, it is a nullity from the outset."); *see also Page v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986) ("A void judgment remains void until such time as jurisdiction is finally determined to exist."). A litigant's delay in challenging the validity of a final judgment is irrelevant; the only question for the court to consider is whether the judgment is void. *See Robinson Eng'g Co. Ltd. Pension Plan & Trust v. George*, 223 F.3d 445, 453-54 (7th Cir. 2000) (noting that a litigant's delay in moving to vacate default judgment was irrelevant and reversing the district court's denial of its Rule 60(b)(4) motion).

On its face, the "reasonable time" limitation applicable to Rule 60(b) appears to conflict with the fundamental principle that a judgment or order obtained in violation of due process can never become enforceable. In response, the majority of courts have adopted three special rules in applying Rule 60(b) to voidness challenges. First, the usual requirement under Rule 60(b) that motions to vacate must be brought "within a reasonable time" does not apply to motions alleging a judgment or order is void on due process grounds. *See, e.g.*, *Carter v. Fenner,* 136 F.3d 1000, 1006 (5th Cir. 1998) (explaining that the "'reasonable time' limit of Rule 60(b) cannot be enforced with regard to this class of motion"); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d at 224 n.9 (noting that Rule 60(b)(4) is not subject to any time limitation); *Austin v. Smith*, 312 F.2d 337, 343 (D.C. Cir. 1962) (permitting garnishee's "tardy attack" on default judgment under Rule 60(b)(4)).

Second, district (and bankruptcy) courts do not have discretion in granting relief from a void judgment or order. *See, e.g.*, *Carter*, 136 F.3d at 1005 ("When, however, the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion, the judgment is either void or it is not.") (citing *Recreational Properties, Inc. v. Southwest Mortgage Service Corp.*, 804 F.2d 313-14 (5th Cir. 1986)); *V.T.A.*, 597 F.2d at 224 n.8 ("[I]f voidness is found, relief is not a discretionary matter; it is mandatory."); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 ("[N]o question of discretion" exists when a Rule 60(b) motion is brought under subsection (b)(4).).

Third, although a motion to vacate a void judgment or order under Rule 60(b) is an *available* remedy, a

Rule 60(b) motion (with its concomitant limitations) is not the *exclusive* avenue for avoiding enforcement of void judgments. For instance, a number of courts have simply declined to preclude creditors who did not receive proper notice from pursuing claims purportedly discharged under a confirmation plan. *See, e.g., Dalton Dev. Project #1 v. Unsecured Creditors Comm. (In re Unioil)*, 948 F.2d 678, (10th Cir. 1991) (overruling bankruptcy court's determination in response to motion by debtors that creditors who did not receive proper notice were barred from pursuing claims); *Crow v. Spring Valley Farms, Inc. (In re Spring Valley Farms, Inc.)*, 68 B.R. 756, (Bankr. N.D. Ala. 1986) (denying summary judgment motion in nuisance and trespass law suit arguing that claims were discharged under confirmation order). Similarly, courts have issued declaratory relief in separate actions (like the adversary proceeding here) that were not brought under Rule 60(b). *See, e.g., Chance Rides, Inc. v. Chance Indus., Inc. (In re Chance Ind., Inc.)*, 367 B.R. 689 (Bankr. D. Kan. 2006) (declaratory judgment action seeking determination that state court personal injury claims were not discharged by void confirmation order); *Geno Enters, Inc. v. Newstar Energy U.S.A., Inc. (In re Newstar Energy of Texas, LLC)*, 280 B.R. 623 (Bankr. W.D. Mich. 2002) (declaratory judgment action seeking determination that notice of plan discharging claims insufficient and authorization to proceed with claims in state court).

The court of appeals's ruling in this case rejects all three of these rules. Under the court of appeals's ruling, Rule 60(b) challenges based on lack of constitutionally required notice are subject to the "reasonable time" limitation. Bankruptcy courts do have discretion in granting relief. And an action seeking to prevent enforcement of an allegedly void order is

subject to Rule 60(b), even if brought as a separate proceeding. [*See* Pet. App. 9a-10a.] The net result is that failure to seek timely relief from the issuing court not only forecloses Rule 60(b) as a remedy but precludes *any* action to prevent enforcement of a void judgment or order, effectively making an otherwise void judgment enforceable.

Thus, the court of appeals's holding is fundamentally at odds with the principle flowing from *Mullane* and *City of New York* and endorsed by the majority of courts, that a judgment or order that is void *ab initio* for failure of due process cannot become valid through laches or the passage of time. Clarifying this fundamental due process issue warrants this Court's review.

II. THIS COURT'S REVIEW IS NEEDED TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

This Court's review is also needed to ensure uniformity because the circuits are sharply divided on the question of whether due process challenges to final orders or judgments are subject to the "reasonable time" limitation.

The court of appeals's application of Rule 60(b)'s "reasonable time" limit to Petitioners' request for relief is consistent with existing Second Circuit precedent. Although the Second Circuit has acknowledged that courts have been "exceedingly lenient in defining the term 'reasonable time' with regard to voidness challenges," it has nonetheless repeatedly made clear that district courts retain discretion to deny requests for relief they determine were not made within a reasonable time. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005) (remark-

ing that an action to declare provision of confirmed plan void *ab initio* was subject to "reasonable time" limitations of Rule 60(b)(4)); *see also Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997); *Cent. Vermont Pub. Serv. Corp. v. Herbert*, 341 F.3d 186 (2d Cir. 2003); *State Street Bank & Trust Co. v. Inersiones Errazuriz Limitada*, 374 F.3d 158 (2d Cir. 2004); *Grace v. Bank Leumi Trust Co. of New York*, 443 F.3d 180, 190 (2d Cir. 2006).[8]

The Sixth and Eighth Circuit have similarly applied a reasonable time limitation to Rule 60(b)(4) voidness challenges. *See Manohar v. Massillon Comty. Hosp.*, 208 F.3d 214, No. 99-3481, 2000 WL 302776, at *1 (6th Cir. March 17, 2000) (upholding denial as untimely of Rule 60(b)(4) motion based on lack of subject matter jurisdiction); *Blachy v. Butcher*, No. 03-2079, 2005 WL 843905, at *5 (6th Cir. Apr. 12, 2005) (upholding denial as untimely of Rule 60(b)(4) motion alleging lack of removal jurisdiction); *Richard v. Allen*, 78 F.3d 585, No. 95-3451, 1996 WL 102419 (6th Cir. Mar. 7, 1996) (holding that the district court did not abuse discretion in denying as untimely Rule 60(b)(4) motion based on voidness); *Baldwin v. Cred. Based Asset Servicing & Securitization*, 516 F.3d 734,

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[8] Prior to this case, the Second Circuit had held that a subsequent request for relief as little as a year after the judgment was untimely where voidness was not raised as an issue in an initial request. *State Street Bank*, 374 F.3d at 179; *see also Beller & Keller*, 120 F.3d at 24 (noting that district court probably should have denied as untimely Rule 60(b)(4) motion where party seeking relief filed previous motion that failed to raise the argument). District courts within the Second Circuit have denied Rule 60(b) voidness challenges as untimely where the non-notified party made no previous request for relief. *See United States v. Guzman*, No. S3 92 CR 550, 2006 WL 2637451, at *2 (S.D.N.Y. Sept. 13, 2006).

737 (8th Cir. 2008) (Rule 60(b)(4) motion based on voidness due to lack of notice must be made within a reasonable time).[9]

On the other hand, the majority of circuit courts continue to maintain the contrary position that a judgment or order entered in the absence of constitutionally required notice is void for any and all purposes and may not be revived by the passage of time. *See, e.g.*, *One Toshiba Color Television*, 213 F.3d at 157 ("[N]o passage of time can render a void judgment valid."); *Briley v. Hidalgo*, 981 F.2d 246, 249 (5th Cir. 1993) ("A void judgment cannot acquire validity because of laches on the part of the debtor."); *Owens-Corning*, 759 F.2d at 1448 (same). Thus, notwithstanding the "reasonable time" limitation of Rule 60(b), at least seven circuits have held that a Rule 60(b)(4) motion to set aside a void judgment may be brought "at any time." *See, e.g.*, *One Toshiba Color*

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[9] In 2003, the First Circuit also appears to have adopted the minority view. *See Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 66 (1st Cir. 2003). In *Farm Credit Bank*, the First Circuit eventually concluded that appellants' request for relief was without merit. 316 F.3d at 68. However, in affirming the district court's rejection of the Rule 60(b)(4) motion as untimely, the court indicated that motions brought under rule indeed have a "temporal requirement." *Id.* at 66-67. Citing *Farm Credit*, recent district court cases within the First Circuit have applied a "reasonable time" requirement to Rule 60(b)(4) motions. *See, e.g., Maldonado v. United States*, CA No. 07-119L, CR No. 97-043L, 2007 WL 1592954, at *3 (D.R.I. May 31, 2007) (concluding, inter alia, that appellant's four-and-a-half year delay in bringing his Rule 60(b)(4) motion was unreasonable); *Metro. Prop. & Cas. Ins. Co. v. Elkin (In re Shkolnikov)*, Civ. Action No. 06-10889-DPW, 2006 WL 3536811, at *5 (D. Mass. Dec. 5, 2006) (explaining that a "reasonable time" limit applies to Rule 60(b)(4) motions and remarking that a twenty-six-month delay "cannot be viewed as reasonable").

Television, 213 F.3d at 157; *Garcia Fin. Group, Inc. v. Virginia Accelerators Corp.*, No. 00-1556, 2001 WL 117497, at *2 (4th Cir. Feb. 12, 2001); *Carter*, 136 F.3d at 1005-6 (5th Cir. 1998); *Robinson Eng'g Co.*, 223 F.3d at 448-49; *Owens-Corning*, 759 F.2d at 1448; *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994); *Hertz Corp. v. Alamo Rent-A-Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994); *Austin*, 312 F.2d at 343.

Notwithstanding the opinion of the minority circuits, any reading of Rule 60(b)(4) that affords a court the discretion to reject a challenge to a void judgment is untenable. This view—embraced by the *Spiegel* courts—cannot be squared with the widely recognized principle that the passage of time cannot validate an otherwise void judgment. This Court's review is necessary to resolve the current conflict among the federal circuits and ensure that uniform due process protections remain in force.

III. THE COURT OF APPEALS'S POSITION HAS IMPORTANT CONSEQUENCES FOR BANKRUPTCY CREDITORS.

The revivability of void judgments is not a merely theoretical issue. The court of appeals's holding also has important real-world consequences, particularly in the context of Chapter 11 "mega cases," which are becoming more and more common in the bankruptcy courts and which often impact the rights and property interests of hundreds and even thousands of creditors.

Notice to creditors is a key element of the procedural framework by which property rights can be modified in Chapter 11 proceedings. A minimum of twenty-five days notice to creditors is mandated with respect to the approval of Chapter 11 disclosure state-

ment, or the confirmation of a Chapter 11 plan. *See* FED. R. BANKR. P. 2002(b). And the Bankruptcy Code expressly provides each creditor with the opportunity to "appear and be heard on any issue in a case under this chapter." *See* 11 U.S.C. § 1109(b). Notice thus emerges as a crucial linchpin in the Chapter 11 plan process. Property rights may be radically reshaped or eliminated in the context of a Chapter 11 case, but the affected parties must be given notice of these proposed actions, as well as an opportunity to be heard and to defend their property rights. Where the constitutionally sufficient level of notice has not been provided, it necessarily follows that the Chapter 11 plan cannot and should not be enforceable against the affected creditor. *See Reliable Elec.*, 726 F.2d at 620-23.

For creditors who learn after-the-fact that a bankruptcy court has confirmed a plan of reorganization that purports to impair their rights, the court of appeals's ruling means they must act quickly and diligently to vacate or revoke the plan within a reasonable time or risk having the plan become enforceable against them. Unlike the majority view, the rule announced here would not permit parties who did not receive notice to wait for the debtor to attempt to enforce a void plan against them. *See, e.g.*, *Dalton Dev. Project #1*, 948 F.2d 678; *Crow*, 68 B.R. 756. Nor would it allow affected parties to pursue their underlying claims in a different court with the expectation that they will be able to defend against a summary judgment motion based on the discharge by arguing that they did not receive notice. *See, e.g.*, *Chance*, 367 B.R. 689; *Geno Enters.*, 280 B.R. 623. This is a significant burden on creditors that most of the federal circuits do not impose.

In addition, the court of appeals's holding significantly relaxes the consequences to proponents of a plan of failing to give proper notice. Under the majority view, the degree of notice required is flexible and depends on the circumstances. *Mullane,* 339 U.S. at 314. But if the minimum required notice is not given, the resulting court order can never be enforced. *See One Toshiba Color Television*, 213 F.3d at 157; *Owens-Corning*, 759 F.2d at 1448. The majority rule creates a substantial incentive to identify all ascertainable creditors and ensure that everyone entitled to notice receives proper notice. By authorizing bankruptcy and district courts to cut off attacks on inadequate notice after a "reasonable time"—just seven months in this case—the court of appeals's decision significantly reduces this incentive.

In sum, the court of appeals's ruling tips the balance carefully struck in *Mullane* and its progeny against the interests of creditors, increasing the likelihood that some creditors will lose their rights and property interests without proper notice and a fair opportunity to be heard, as happened to Petitioners here.[10] Although the scale, complexity, time-sensitivity, and importance of finality of reorganization plans in mega cases creates a significant temptation to "cut corners" and relax due process standards, it is critical to resist this temptation. Russell

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[10] The unfairness of the lack of notice in this case is further compounded by the fact that the Release and Injunction purported to extinguish Petitioners' claims against *non-debtors.* As courts have recognized, sweeping releases providing blanket immunity for non-debtors present a heightened potential for abuse and should only be used in rare cases. *See Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 142 (2d Cir. 2005).

A. Eisenberg & Frances Gecker, *Due Process and Bankruptcy: A Contradiction In Terms?*, 10 BANKR. DEV. J. 47, 48, 68 (1993). This Court's review is necessary to ensure that an appropriate baseline of due process is maintained even in the face of the growing pressures posed by huge bankruptcy proceedings.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 11, 2008

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-1310-bk (L), 07-1319-bk (Con), 07-1325 bk (Con)

IN RE: SPIEGEL, INC. ET AL.,
Debtors,

BICO STUPAKOFF and RUSSELL JAMES,
Appellants,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD. and OTTO SUNISHO INC.,
Appellees.

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 13th day of March, two thousand and eight.

Present: HON. JOSEPH M. McLAUGHLIN, HON. RICHARD C. WESLEY, *Circuit Judges*, and HON. BRIAN M. COGAN, *District Judge*.[1]

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Southern District of New York be AFFIRMED.

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[1] The Honorable Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

Appellants Bico Stupakoff and Russell James appeal from a February 26, 2007 decision of the United States District Court for the Southern District of New York (Buchwald, *J.*) affirming three decisions of the United States Bankruptcy Court for the Southern District of New York (Lifland, *J.*). On August 16, 2006, the Bankruptcy Court issued an order denying Appellants' motion for a continuance of the hearing on a motion filed by Peter Rosenbaum Photography Corporation or, in the alternative, for a declaration of the Court that any ruling on Rosenbaum's motion would have no application to any motion or pleading that might be filed by Appellants in the future. On November 1, 2006, the Bankruptcy Court denied Appellants' motion to modify Spiegel's bankruptcy reorganization plan ("Plan") to allow them to participate in a class action lawsuit filed by Rosenbaum as untimely under Federal Rule of Civil Procedure 60(b). The Court also dismissed Appellants' request for a declaratory judgment that they are not bound by the Plan as untimely and, in the alternative, because it failed to state a claim.

Familiarity by the parties is assumed as to the facts, the procedural context, and the specification of appellate issues.

We affirm the Bankruptcy Court's decision that Appellants' motion to modify the Plan was untimely under Rule 60(b). "Motions under Rule 60(b) are addressed to the sound discretion of the . . . court and are generally granted only upon a showing of exceptional circumstances." *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990). Review of a denial of a Rule 60(b) motion is subject to an abuse of discretion standard. *See Sierra Club v. U. S. Army Corps of*

Eng'rs, 732 F.2d 253, 257 (2d Cir. 1984). Appellants claim that the Release and Injunction in the Plan are not enforceable as to them because proper notice of the disclosure statement and Plan was not provided to them. Their request is likely governed by subsection (3) of the Rule, which allows a court to "relieve a party . . . from a final judgment, order, or proceeding" because of the "misconduct by an opposing party" among other reasons. Fed. R. Civ. P. 60(b). A "motion [governed by Rule 60(b)] must be made within a reasonable time—and for reason[] . . . (3) no more than a year after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1). Because Appellants' motion was made more than a year after the Bankruptcy Court confirmed the Plan, the Court correctly found that it was untimely under Rule 60(b)(3). Even if the Appellants' motion is properly governed by 60(b)(5) "and/or" (6) as Appellants allege—which we doubt—and the motion's timeliness is thus examined under 60(b)'s "reasonable time" provision, the Court's alternative holding that Appellants' seven-month delay in filing after becoming aware of the Plan's existence was unreasonable is still well within its discretion.

We likewise affirm the Bankruptcy Court's decision that Appellants' request for a declaratory judgment was untimely. "[D]ecisions about the propriety of hearing declaratory judgment actions . . . should be reviewed for abuse of discretion." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995). Though Appellants claim that the abuse of discretion standard does not apply in this appeal, both of their arguments fail. First, the Court's dismissal of Appellants' request as untimely is no different for the purposes of our review than if the Court had explicitly declined to hear Appellants' request as

untimely. *See id.* ("[C]ourts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion."). Second, the language from *Wilton* which Appellants interpret as limiting abuse of discretion review to cases in which there is a parallel state proceeding does no such thing, nor do any of this Court's cases. *See id.* at 290 (declining "to delineate the outer boundaries of [a court's] discretion" in cases arising in different procedural context, not questioning whether courts still *have* discretion in other contexts). The Bankruptcy Court's decision to dismiss Appellants' request as untimely because it was "[e]ssentially . . . a collateral attack on [the] Plan" and Appellants are "precluded from seeking to modify the Confirmation Order and Plan . . . under Rule 60(b) . . . [because Appellants] have not brought their request . . . in a reasonable time" is well within its discretion, as discussed above.

Moreover, Appellants' claim that *Whelton v. Educational Credit Management Corp.*, 432 F.3d 150 (2d Cir. 2005), "bears striking . . . similarities" to this case does nothing to help their cause. That case held that Rule 60(b)'s time-limits applied to a request to "declare one of the provisions of a confirmed plan void." *Id.* at 156 n.2. In addition, *Whelton* does not hold, as Appellants would have it, that a bankruptcy court *must* find that filing a Rule 60(b) motion within two years is reasonable. As in *Whelton*, we are only concerned here with whether the bankruptcy court acted within its discretion. We find that it did, and nothing in *Whelton* requires otherwise.

Finally, we affirm the District Court's ruling that Appellants' appeal from the Bankruptcy Court's August 16th order is moot. Appellants themselves concede that if this Court rules against them on their other two grounds for appeal, as we have, their appeal on this point is moot.

Accordingly, for the reasons set forth above, the judgment of the District Court is hereby AFFIRMED.

For the Court

Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Case No. 03-11540(BRL)

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06 Civ. 09385(NRB)
06 Civ. 13584(NRB)
06 Civ. 13585(NRB)

IN RE: SPIEGEL, INC. ET AL.,
Debtors,

BICO STUPAKOFF and RUSSELL JAMES,
Appellants,

against

OTTO (GMBH & CO KG), OTTO DOOSAN LTD.
and OTTO SUNISHO INC.,
Appellees.

MEMORANDUM AND ORDER

Appellants Bico Stupakoff and Russell James (the "Photographers") present three appeals against Appellees Otto, Otto Doosan, Ltd., and Otto Sumisho, Inc., from orders of the United States Bankruptcy Court for the Southern District of New York (the "bankruptcy court") dated August 16, 2006 and November 1, 2006 (the "August 16 Order" and the "November 1 Order"). These appeals relate to a bankruptcy reorganization plan (the "Plan") for a company called Spiegel, Inc. ("Spiegel"). In the first appeal addressed herein, case number 06 Civ. 13584, the Photographers challenge the bankruptcy court's

November 1, 2006 dismissal of their request for a declaratory judgment stating that they are not bound by the "release and injunction terms" of the Plan (the "First Appeal"). In the second appeal, case number 06 Civ. 13585, which arises from the same order, the Photographers challenge the bankruptcy court's denial of their motion to modify the Plan so that the Photographers could participate in a class action lawsuit (the "Second Appeal"). In the third appeal, case number 06 Civ. 09385, the Photographers challenge the bankruptcy court's general order that the release and injunction terms of the Plan bar the Photographers from raising certain copyright claims against Appellees the ("Third Appeal"). We address each of these appeals in turn. For the sake of expediency, we refer the reader to the background information provided in the bankruptcy court's August 16 and November 1 Orders. We repeat only the necessary facts in this Memorandum and Order.

THE FIRST APPEAL

The First Appeal stems from an adversary proceeding filed by the Photographers on June 21, 2006. In their "Complaint for Declaratory Judgment" (the "Complaint"), the Photographers sought a declaration that the release and injunction provisions of the Plan do not apply to them because they were "known creditors" who did not receive constitutionally required notice of the Plan prior to the Plan's confirmation.[1] The Photographers seek this judgment

[1] Before extinguishing, releasing, or enjoining claims under a bankruptcy plan, a debtor is required to make reasonably diligent efforts to find all reasonably ascertainable creditors and to provide actual notice to those creditors. *Tulsa Professional Collection Services, Inc. v. Pope*, 484 U.S. 478, 490 (1988).

because they now wish to pursue certain copyright claims that Appellees may argue were released and enjoined by the Plan. Appellees moved to dismiss and the bankruptcy court granted that motion, holding: (1) that the Complaint failed to sufficiently plead that the Photographers were known creditors who did not receive notice prior to the Plan's confirmation, and (2) that the Photographers' motion for a declaratory judgment was an untimely request for relief from a final judgment, i.e. from the bankruptcy court's confirmation of the Plan, under Federal Rule of Civil Procedure 60.

A bankruptcy court's decision to grant a motion to dismiss is reviewed by the appellate court *de nova. See e.g. Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001). Motions to dismiss are governed by Federal Rule 12(b) (6), which applies to the bankruptcy courts through Bankruptcy Rule 7012(b). In reviewing a motion to dismiss, a court merely assesses the legal feasibility of the complaint and does not weigh the evidence that may be offered at trial. In re *Churchill Mortg. Inv. Corp.*, 256 B.R. 664 (Bankr. S.D.N.Y. 2000). Accordingly, a motion to dismiss must be denied unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief". In making this assessment, a court must accept all well-plead allegations as true and must construe those allegations in the light most favorable to the plaintiff. *Conley v. Gibson*, 355 U.S. 41, 57 (1957).

Having reviewed the Complaint, the bankruptcy court's November 1 Order, and the briefs submitted in connection with this appeal, we affirm the bankruptcy court's dismissal of the Complaint pursuant to Federal Rule 12(b) (6) for the reasons provided in the

November 1 Order. The Photographers have not sufficiently pled that they were known creditors of Spiegel upon confirmation of the Plan. Instead, the Photographers have merely pled that some conjecture or speculation could have led Spiegel to the possibility that the Photographers might, in the future, bring claims against Spiegel or a third party that could be covered by the Plan.[2] Accordingly, we affirm the bankruptcy court's judgment in case number 06 Civ. 13584.[3]

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[2] For instance, the Photographers suggest that Spiegel should have known about the Photographers' claims prior to the Plan's confirmation because a third party, the Rosenbaum photographers, brought a suit alleging similar claims, before the Plan's confirmation, against yet another party, the Appellees. Essentially, the Photographers suggest that Spiegel, upon notice of a lawsuit against Appellees, should have imagined all possible lawsuits against or involving Spiegel that might arise from similar claims in the future. This kind of speculation and conjecture is not required of a debtor. *See e.g. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (no due process requirement for "impracticable and extended searches"); *see also In re U.S.H. Corp. of N.Y.*, 223 B.R. 654, 660 (Bankr. S.D.N.Y. 1998).

[3] We need not review the bankruptcy court's holding that the Photographers' suit for a declaratory judgment is also barred by Federal Rule 60 because the Photographers failed to state a claim sufficient to avoid dismissal under Federal Rule 12(b) (6). Moreover, even if the bankruptcy court had not dismissed pursuant to Rules 12(b) (6) and 60, we have no doubt that it would have declined to use its discretion under the Declaratory Judgment Act to review the Photographers' claims. *See generally Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-90 (1995) (decision not to afford relief under the Declaratory Judgment Act reviewed for abuse of discretion). As the bankruptcy court discussed in the November 1 Order, the Plan confirmed a corporate reorganization involving multiple parties and several hundred million dollars in May of 2005, and the release and

THE SECOND APPEAL

The Second Appeal stems from the bankruptcy court's denial of the Photographers' motion to modify the Plan so that the Photographers could file copyright claims in another court. The Second Appeal involves an actual effort by the Photographers to modify or gain relief from the bankruptcy court's confirmation of the Plan.[4] We affirm the bankruptcy court's decision on this matter for the reasons provided in the November 1 Order, including that the Photographers' efforts to modify or gain relief from the Plan are untimely under Fed. R. Civ. P. 60 because the Photographers could have brought the Complaint as early as November of 2005, but did not actually seek to protect their rights until June of 2006. Thus, the bankruptcy court's decision in case number 06 Civ. 13585 is affirmed.

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injunction provisions of the Plan were key components of that confirmation. The bankruptcy court also noted that the Photographers knew of the Plan and of its release and injunction provisions by November of 2005, but did not bring the Complaint until June 21, 2006 and never requested expedited relief from the bankruptcy court. Given the Photographers' delay in asserting their rights and the reasoning in the November 1 Order, we have no doubt that the bankruptcy court would have declined to apply the Declaratory Judgment Act to the Photographers' claims had it addressed that issue expressly. Thus, even if it were appropriate to remand this case to the bankruptcy court after considering its decisions on Rules 12(b)(6) and 60, which we believe it is not, we would decline to do so given that explicit consideration of the Declaratory Judgment Act would not have yielded a different result.

[4] In this respect, we believe that it differs from the Photographers' effort to seek a declaratory judgment addressed in the First Appeal. See supra note 3.

THE THIRD APPEAL

The Third Appeal stems from a different proceeding, brought on June 22, 2006 by the Rosenbaum photographers and addressed in the August 16 Order. During the Rosenbaum lawsuit, the Photographers moved for a continuation so that the Photographers could make their own motions or, in the alternative, for a declaration that any decision in the Rosenbaum lawsuit would not have any preclusive effect on their Complaint for a Declaratory Judgment addressed in the First Appeal. Essentially, the Rosenbaums had requested relief similar to the declaration sought by the Photographers—that they were not bound by the Plan—and the Photographers wanted a declaration that any decision in the Rosenbaum case would not adversely affect the Photographers' efforts to obtain declaratory relief. The bankruptcy court verbally denied the Photographers' motions on June 22, 2006 and elaborated on that dismissal, *inter alia*, on August 16th.

The Photographers raise a number of challenges to the bankruptcy court's June 22 ruling and August 16 Order. As a practical matter, however, the Photographers' ultimate concern is that the August 16 Order will bar them from pursuing the declaratory relief addressed in the First Appeal.[5] Since we affirm

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[5] "The issue before this court is whether the Bankruptcy Court erred in declaring a non-debtor release contained in the confirmed plan of Spiegel, Inc. and its affiliated debtors . . . to be generally valid and enforceable where (i) the Photographers have raised due process and notice objections to such release, (ii) the Photographers filed a separate adversary proceeding to adjudicate these objections; and (iii) the Photographers have not yet received a hearing on these objections." Brief of Appellants Bico Stupakoff and Russell James, dated October 30, 2006 ("App. Br. 3d Appl.") at 1.

the bankruptcy court's decision in case number 06 Civ. 13584 that the Photographers' Complaint failed to state a claim sufficient to support the declaratory judgment addressed in the First Appeal, the issue raised in the Third Appeal is now moot.

CONCLUSION

For the reasons discussed above, we affirm the bankruptcy court with respect to the First and Second Appeals and dismiss the Third Appeal as moot.

SO ORDERED.

Dated: New York, New York
February 26, 2007

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No. 03-11540(BRL)
(Jointly Administered)

IN RE: SPIEGEL, INC. ET AL.,
Debtors,

Adv. Proceeding No. 06-1554 (BRL)

BICO STUPAKOFF and RUSSELL JAMES,
Plaintiffs,

against

OTTO (GMBH & CO KG), OTTO DOOSAN LTD.
and OTTO SUNISHO INC.,
Defendants.

OPINION AND ORDER DENYING PLAINTIFFS' REQUEST FOR AN ORDER MODIFYING THE PLAN INJUNCTION AND GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court are two motions. First, on August 30, 2006, Bico Stupakoff and Russell James (collectively the "Plaintiffs") filed the Motion to Modify Plan Injunction for Limited Purpose of Filing Claims in Illinois Litigation Pending Adjudication of Validity of Plan Releases (the "Motion to Modify the Plan") relying on Rule 60(b) of the Federal Rules of Civil Pro-

cedure (the "Federal Rules"). The Otto Entities filed an objection to the Motion on October 13, 2006. Second, on October 5, 2006, Defendants Otto Doosan, Ltd., Otto Sumisho Inc., and Otto (GmbH & Co, KG) (collectively, the "Otto Entities" or "Defendants") filed a Motion to Dismiss the Complaint (the "Motion to Dismiss") of Bico Stupakoff and Russell James (the "Complaint") for failure to state a claim, pursuant to Rule 12(b)(6) of the Federal Rules made applicable by Rule 7012(b) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). A hearing was held before this Court on October 18, 2006 and the Court ruled on both motions at the hearing, denying the Plaintiffs' Motion to the Modify the Plan and granting the Defendants' Motion to Dismiss. This opinion and order augments the Court's dispositions on the record of the hearing on the motions.

BACKGROUND

Spiegel Bankruptcy

On March 17, 2003, Spiegel Inc. ("Spiegel") and certain of its direct and indirect subsidiaries (collectively with Spiegel, the "Debtors") filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code. In March 2005, this Court entered an order approving the Spiegel disclosure statement and setting a hearing on confirmation of the Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan"). The Plan contained a release and injunction, which released all claims that any entity might hold against Spiegel and the affiliated entities and enjoined parties from bringing suit to attempt to collect the

released obligations[1] (the "Release and Injunction"). By order dated May 25, 2005 (the "Confirmation Order") this Court confirmed the Debtors' Plan. *In re Spiegel, Inc.*, 2005 Bankr. LEXIS 1113 (Bankr. S.D.N.Y. May 25, 2005).

The Peter Rosenbaum Photography Motion[2]

On January 30, 2004, Peter Rosenbaum Photography Corporation ("Rosenbaum") commenced an action against the Otto Entities in the United States District Court for the Northern District of Illinois (the "Illinois Court") seeking damages for improper use of photographs taken by Rosenbaum ("Illinois Complaint"). In November 2005, Rosenbaum requested leave from the Illinois Court to file a Second Amended Complaint, which was a purported class action complaint naming as plaintiffs, among others, Bico Stupakoff and Russell James. In response, the Otto Entities filed a notice to the Illinois Court of the Release and Injunction incorporated into the Confirmation Order. The Illinois Court then instructed the parties to ask this Court for instruction on the applicability of the Release and Injunction on the proceedings before the Illinois Court.

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[1] The total value of the consideration paid by the Otto Entities for the Release and Injunction was not less than $260.4 million.

[2] The Rosenbaum Motion was addressed in more detail by this Court in the Written Opinion/Finding of Fact, Conclusions of Law, and Order signed on August 16, 2006 Denying Motion of Peter Rosenbaum Photography Corporation for a Declaratory Ruling Pursuant to Sections 105(a) and 1109(b) of the Bankruptcy Code, etc. and Denying Related Relief, Case No. 03-11540, ECF No. 4487 (the "August 16 Order"), which is annexed as Exhibit A.

In May 2006, Rosenbaum filed a motion seeking this Court's determination that the Release and Injunction do not bar the Illinois Complaint from going forward (the "Rosenbaum Motion"). The hearing on the Rosenbaum Motion was scheduled for June 22, 2006. On June 21, 2006, the Plaintiffs surfaced for the first time before this Court, requesting a continuance of the hearing on the Rosenbaum Motion or a declaration that any ruling on the Rosenbaum Motion shall have no preclusive effect on any motion or pleading filed by the Plaintiffs. This Court denied both requests.

The Court denied the Rosenbaum Motion and the parties settled an order consistent with this Court's findings on the record. Rosenbaum has appealed the August 16 Order, as have the newly surfaced Plaintiffs.

The Adversary Proceeding

On June 21, 2006, contemporaneously with the filing of the request for an adjournment of the Rosenbaum Motion or a special finding relating to the Rosenbaum Motion, the Plaintiffs commenced an adversary proceeding. The complaint (the "Complaint") alleges that Plaintiffs licensed photographs to Spiegel for its use in its catalogs, that Spiegel subsequently provided the photographs to the Otto Entities for their use and that the Otto Entities used these images without permission or license. The Plaintiffs are seeking declaratory relief that because the Plaintiffs were allegedly known creditors of Spiegel, Inc. and the Otto Entities, yet did not receive specific notice and an opportunity to object to the Release and Injunction contained in the Plan, the Release and Injunction do not apply to them.

THE MOTION TO MODIFY THE PLAN

Plaintiffs seek to modify the Release and Injunction contained in the Plan, so they may file an intervention pleading in Illinois District Court, asserting claims on their behalf and on behalf of other unknown parties[3] holding claims against the Otto Entities. The Plaintiffs allege this relief is appropriate to preserve their rights and avoid the expiration of unspecified statutes of limitations[4] while the appeal of the August 16 Order is pending in the Southern District of New York District Court.

Pursuant to 11 U.S.C. sections 1144[5] and 1127(b)[6], courts have limited jurisdiction to modify a plan of reorganization after substantial consummation. Courts have noted that Bankruptcy Rule 9024 expressly provides that Rule 60(b) of the Federal Rules ("Rule

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[3] At the hearing held on October 18, 2006, counsel for the Plaintiffs repeatedly referred to claims the Plaintiffs have against the Otto Entities and noted that the Plaintiffs believe there are other parties with similar claims that they hoped would join the Plaintiffs in the Illinois litigation in the future.

[4] The Plaintiffs' pleadings do not specify which claims they may be prevented from asserting; what statute of limitations is invoked, nor do they provide any background as to why they have waited until October 18, 2006 to bring to this Court's attention causes of action they have doubtless been aware of since November 2005 when Rosenbaum's Proposed Second Amended Complaint in the Illinois Court named them as proposed class action plaintiffs.

[5] Pursuant to 11 U.S.C. § 1144, a party in interest may request revocation of an order of confirmation only within 180 days of entry of the order of confirmation, and only if approval of the order was procured by fraud.

[6] Pursuant to 11 U.S.C. § 1127(b), "a proponent of a plan or the reorganized debtor" may modify a plan prior to substantial consummation of the plan.

60(b)") does not override the time allowed in section 1144 for filing a complaint to revoke an order confirming a plan. *In re Petition of Board of Directors of Hopewell Intern. Ins., Ltd.*, 281 B.R. 200, 207 (Bankr. S.D.N.Y. 2002). Plaintiffs point out, however, that courts have ruled that Federal Rule 60(b) can be used to relieve a creditor from the operation of a confirmation order and the Plaintiffs therefore urge this Court to find their request appropriate under Federal Rule 60(b)(6). The Second Circuit has held that Rule 60(b) motions are within the discretion of the court, and "are generally granted only upon a showing of exceptional circumstances." *Mendell v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), aff'd 501 U.S. 115 (1991). A movant must establish one of the Enumerate grounds for relief under Rule 60(b) and that the harm to the movant (Plaintiffs) outweighs the necessity for finality in the order confirming the plan of reorganization. *In re 401 East 89th Street Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998). In this case, granting such relief would be improper.

Federal Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason justifying relief from the operation of the judgment. Fed. R. Civ. Pro. 60(b). Subsection (6) of Federal Rule 60(b) is properly invoked only when there are extraordinary circumstances justifying relief, when the judgment may work an extreme and undue hardship, and when the asserted grounds for relief are not recognized in

clauses (1)-(5) of the Rule. *Nemaizer v. Baker*, 793 F.2d 58 (2d Cir. 1986).

In this case, the Plaintiffs assert that the Release and Injunction in the Plan are not enforceable as to them because proper notice of the disclosure statement and plan was not provided to them. The Otto Entities contend that if Rule 60(b) relief was proper in this case, it should have been requested pursuant to Rule 60(b)(3), which relates to misconduct of a party, which would preclude the Plaintiffs from requesting relief under subsection six. Plaintiffs urge the Court to find their request proper under subsection three. In any case, under subsections three or six, the Plaintiffs have not made the showing required for this Court to consider the relief they are requesting.

Subsections three and six of Federal Rule 60(b) require that a motion be made within a reasonable time,[7] and in the case of subsection three, within one

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[7] Plaintiffs argued at the hearing that pursuant to recent Second Circuit case law, two years is a reasonable time in which to file a motion under Rule 60(b). *Whelton v. Educational Credit Management Corp.*, 150 F.3d 150, 156 fn2 (2d Cir. 2005). The Whelton case is distinguishable, however. As this Court stated at the hearing on October 18, 2006, "It's clear to me that the Plaintiffs in this instance are well outside the comfort zone of the Whelton case and should not be enheartened by its application or putative application to the position they take." Transcript at 26. Whelton involved a Rule 60(b)(4) motion to declare one provision of a plan of reorganization (relating to discharge of student loans) void *ab initio* because it violated the Bankruptcy Code. These Plaintiffs seek to have this Court make a finding that a Release and Injunction in a confirmed plan of reorganization are not enforceable as to the Plaintiffs so that the Plaintiffs may file causes of action on behalf of themselves and a group of unknown plaintiffs with similar causes of action.

year of the order. This Court approved the Confirmation Order in the Debtors' cases on May 25, 2005. In November 2005, Rosenbaum filed the motion requesting leave to file the Second Amended Complaint, included Bico Stupakoff and Russell James as plaintiffs and the Otto Entities filed the notice of injunction. At the very latest, the Plaintiffs knew of their alleged claims against the Otto Entities and knew of the injunction contained in the Confirmation Order by November 2005. Plaintiffs did not file the Complaint until June 21, 2006, and never requested expedited relief. Plaintiffs filed the Motion for Plan Modification on August 30, 2006, fifteen months after the Confirmation Order was approved in these cases, and they requested a hearing date on the Motion for Plan Modification some seventeen months after the Confirmation Order was approved. Under either subsection three, which is arguably the relevant section of Federal Rule 60(b), or subsection six, pursuant to which the Plaintiffs requested relief, the Plaintiffs have not filed their motion in a timely fashion. Furthermore, even if the Plaintiffs contend that their request is timely, they have not demonstrated sufficient extraordinary circumstances or undue hardship to justify rewriting of the provisions of a confirmed plan of reorganization.

Even if the Plaintiffs were able to get past the strict limitation on modifying a confirmation order and plan pursuant to 11 U.S.C. section 1127(b), they would not meet the timing requirements of Rule 60(b) to have their motion considered by this Court.

Accordingly, the Plaintiffs' Motion to Modify the Plan is denied.

THE MOTION TO DISMISS

The Defendants urge this Court to dismiss the Complaint, citing as bases for dismissal the August 16 Order,[8] the doctrines of *res judicata* and equitable mootness, that the claims asserted in the Complaint have no legal basis, and because the Plaintiffs' reliance on inadequate notice is wrong as a matter of law. The Plaintiffs contend that despite the legal positions of the Defendants, the real issue raised by the Complaint is whether the Release and Injunction are enforceable against the Plaintiff Photographers, given the lack of notice to the Plaintiff Photographers that this relief was sought against them. Due process is met if notice is "reasonably calculated to reach all interested parties, reasonably conveys all of the required information, and permits a reasonable amount of time for response." *Mullane v. Central Hanover Bank,* 339 U.S. 306, 314 (1950); *In re U.S.H. Corp. of New York,* 223 B.R. 654 (Bankr. S.D.N.Y. 1998).

Rule 12(b)(6) of the Federal Rules, which is made applicable to this proceeding by Rule 7012(b) of Bankruptcy Rules, enables a defendant to move to dismiss a complaint on the ground that it fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); Fed. R. Bankr. P. 7012(b). In reviewing a motion to dismiss, a court merely assesses the legal feasibility of the complaint, and does not weigh the evidence that may be offered at trial. *In re Churchill Mortg. Inv. Corp.,* 256 B.R. 664 (Bankr. S.D.N.Y. 2000). A motion to dismiss must be denied unless it, appears beyond doubt that the plaintiff can prove no set of facts in support of its

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[8] As the August 16 Order appeal is currently pending, this Court will not address whether or not that aspect of the Defendants' motion is determinative.

claim which would entitle it to relief. *Conley v. Gibson,* 355 U.S. 41, 57 (1957). All well-pled factual allegations must be read by the court as true and construed in a light most favorable to the plaintiff. *Conley v. Gibson,* 355 U.S. at 57.

Although this Court is to take the well-pled allegations in the Complaint as true for a motion to dismiss, "'[l]egal conclusions, deductions or opinions couched as factual allegations are not given a presumption of truthfulness.'" *Mason v. American Tobacco Co.,* 346 F.3d 36, 39 (2d Cir. 2003). The Defendants contend, and this Court agrees, that several key conclusory statements in the Complaint are in fact legal conclusions. They were not well-pled and need not be considered in a light favorable to the Plaintiffs.

The Plaintiffs contend that they were known creditors of Spiegel at the time the disclosure statement was filed because Peter Rosenbaum Photography filed the original Illinois complaint in January 2004. However, the Plaintiffs were not related to the original complaint. The Plaintiffs did not become involved in the Illinois litigation until November 2005, months after the Plan was approved in the Spiegel cases. The Plaintiffs contend that because their causes of action against the Otto Entities are similar to those pled by Rosenbaum in the original complaint filed by Rosenbaum in January 2004, the Otto Entities were also aware of their claims. The Debtors and the Otto Entities are not required to employ a crystal ball, however, when one complaint is filed to determine whether any other similar claims exist. *See Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 478, 490 (1988) (Debtor is required to make reasonably diligent efforts to determine creditors). The un-

supported assertion in the Complaint is not sufficient to require this Court to take the statement as true for the purposes of the Motion to Dismiss.

Plaintiffs do not quarrel with the sufficiency of the publication notice as to unknown creditors, but allege that they were known creditors entitled to a greater level of notice. Plaintiffs state in a conclusory fashion, "Defendants knew or should have known that the Plan granted relief for their benefit, and against the Plaintiffs, and that the Plaintiffs were therefore entitled to notice of such relief, including but not limited to notice of the Plan and Disclosure Statement." Compl. at ¶ 25. Courts require debtors to take reasonably diligent efforts and provide notice of a plan and disclosure statement to reasonably ascertainable creditors. *See Id.* (Everyone who may conceivably have a claim is not entitled to actual notice, rather publication notice is sufficient for creditors who are not reasonably ascertainable). Efforts beyond a careful examination of the Debtors books and records are generally not required. *In re U.S.H. Corp. of New York,* 223 B.R. 654 (Bankr. S.D.N.Y. 1998). Plaintiffs do not allege that a proper examination of the books and records would have uncovered their claim. As pointed out above, the only issue as to due process is whether there is some reasonable basis to infer the existence of the creditors. In this case, there is none, leaving no foundation for the due process argument which is the core of the complaint.

As with the Motion to Modify the Plan, the Motion to Dismiss ultimately is governed by Rule 60(b). Leaving aside the foregoing analysis regarding the factual allegations, and the curbs placed on this Court by 11 U.S.C. sections 1127(b) and 1144, and even taking the allegations pled as true, the Plain-

tiffs have no recourse against the Otto Entities because they would likewise be precluded from seeking to modify the Confirmation Order and Plan in this case under Rule 60(b). This Court finds that the Plaintiffs have not brought their request before this Court in a reasonable time given the discussion above relating to Rule 60(b) and that therefore, no relief is available to the Plaintiffs.

Essentially, this Complaint is a collateral attack on a Plan and Confirmation Order that were approved by this Court over a year ago. Congress has put into place various limitations Bankruptcy Rule 8002 underscores the importance of finality of a court's order approving a disclosure or plan of reorganization. Fed. R. Bankr. Proc. 8002.[9] As noted above, 11 U.S.C sections 1127(b) and 1144 proscribe limitations on modification of a plan of reorganization. *See* fn 5 and 6.

For all of the foregoing reasons, the Motion to Modify the Plan and Confirmation Order is denied and the Motion to Dismiss the Complaint is granted.

IT IS SO ORDERED.

Dated: November 1, 2006
New York, New York

/s/ Hon. Burton R. Lifland
United States Bankruptcy Judge

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[9] While the normal ten day period to appeal other orders of a bankruptcy court may be extended on application of a party in interest, pursuant to Bankruptcy Rule 8002(c), orders of the bankruptcy court relating to confirmation of a plan and approval of the disclosure statement are of such significance to the administration of the case, the parties in interest, and third parties that the court has no discretion to extend the time to file an appeal unless the request for an extension is filed before the time to appeal expires.

APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11 Cases
Case No. 03-11540(BRL)
(Jointly Administered)

IN RE: SPIEGEL, INC. ET AL.,
Debtors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER DENYING MOTION OF PETER ROSENBAUM PHOTOGRAPHY CORPORATION FOR A DECLARATORY RULING PURSUANT TO SECTIONS 105(a) AND 1109(b) OF THE BANKRUPTCY CODE, ETC. AND DENYING RELATED RELIEF

Peter Rosenbaum Photography Corporation ("*Rosenbaum*") brought this motion dated May 4, 2006 (the "*Motion*"), for an order pursuant to sections 105(a) and 1109(b) of the Bankruptcy Code: (1) declaring that Rosenbaum's claims against Otto (GmbH & Co KG) ("*Otto KG*"), Otto Doosan Ltd. (f/k/a Otto Doosan Mail Order Ltd.) ("*Doosan*"), and Otto Sumisho Inc. ("*Sumisho*," and together with Otto KG and Doosan, the "*Named Defendants*") in an action (the "*Illinois Action*") filed in the United States District Court for the District of Illinois (the "*Illinois Court*") are unrelated to the chapter 11 cases of Spiegel Inc. ("*Spiegel*") and certain of its direct and indirect subsidiaries (collectively with Spiegel, the "*Debtors*") and, therefore, are not barred by the release and

injunction provisions of the Debtors' plan of reorganization and related confirmation order; and (2) authorizing such claims to proceed. The Named Defendants' filed an objection to the Motion, dated June 5, 2006 (the "*Objection*") and Rosenbaum filed a Reply in support of the Motion, dated June 15, 2006 (the "*Reply*").

On June 21, 2006, Bico Stupakoff and Russell James (collectively, "*Stupakoff and James*") moved for a continuance of the hearing (the "*Hearing*") on the Motion (the "*Adjournment Motion*") or a declaration of the Court that any ruling on the Motion shall have no preclusive effect on any motion or pleading filed by Stupakoff and James. The Named Defendants objected to the Adjournment Motion, dated June 21, 2006.

The Hearing was held before this Court on June 22, 2006. Having considered all of the evidence, testimonial and documentary, as well as the arguments of the parties, and their Proposed Findings of Fact and Conclusions of Law, and keeping in mind that a court should not blindly accept findings of fact and conclusions of law proffered by the parties, *St. Clare's Hospital and Health Center v. Insurance Company of North America (In re St. Clare's Hospital and Health Center)*, 934 F.2d 15 (2d Cir.1991) (citing *U.S. v. El Paso Natural Gas Co.*, 376 U.S. 651, 656, 84 S. Ct. 1044, 12 L.Ed.2d 12 (1964)), and having conducted an independent analysis of the law and the facts, consistent with the record of the hearing on June 22, 2006 at which this Court made its preliminary findings and conclusions, this Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

IT IS HEREBY FOUND that:

The Spiegel Chapter 11 Cases

A. On March 17, 2003, each of the Debtors filed a voluntary petition in this Court for relief under chapter 11 of the Bankruptcy Code.

B. Subsequently, Rosenbaum filed a proof of claim for $210,186.75 relating to services performed for the Debtors in the Debtors' cases. This proof of claim was assigned to a third party.

C. This Court takes judicial notice of the docket of the Chapter 11 Cases maintained by the Clerk of the Court or its duly appointed agent, including, without limitation, all pleadings and other documents filed, all orders entered, and all evidence and arguments made, proffered or adduced at, the hearings held before this Court during the pendency of these chapter 11 cases.

The Spiegel Plan

D. By order, dated May 25, 2005 (the "*Confirmation Order*"), this Court confirmed the Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "*Plan*").[1] *In re Spiegel, Inc.*, 2005 Bankr. LEXIS 1113 (Bankr. S.D.N.Y. May 25, 2005). Regarding the events leading up to the hearing on confirmation of the Plan (the "*Confirmation Hearing*"), the Confirmation Order included, *inter alia*, the following findings:

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[1] Unless otherwise specified, capitalized terms and phrases used herein shall have the meanings provided in the Plan. The term "Affiliate" shall have the meaning ascribed to it in the Bankruptcy Code.

E. On March 28, 2005, the Debtors filed their First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (Docket No. 3082) and accompanying First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the First Amended Joint Plan of Reorganization of Affiliated Debtors (Docket No. 3084) (as modified, amended or supplemented from time to time and including all exhibits and schedules thereto, the "Disclosure Statement"). On May 23, 2005, the Debtors filed a Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (Docket No. 3556) (the "Plan")[2] that incorporated certain non-material technical amendments and modifications.

* * *

G. On March 29, 2005, after due notice and a hearing held on March 29, 2005, this Court entered an order (Docket No. 3116) (the "Disclosure Statement Order") that, among other things, (a) approved the Disclosure Statement as containing adequate information, . . . and (f) established notice and objection procedures in respect of confirmation of the Plan, including a form of confirmation hearing notice (the "Confirmation Hearing Notice").

* * *

I. Adequate and sufficient notice of the Confirmation Hearing and other requirements and

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[2] Unless otherwise specified, capitalized terms and phrases used [in the Confirmation Order] have the meanings as defined in the Plan.

> deadlines, hearings and matters described in the Disclosure Statement Order was provided in compliance with the Bankruptcy Code, the Bankruptcy Rules and the Disclosure Statement Order. . . . [T]he Confirmation Hearing Notice was mailed on or about April 5, 2005 to Holders of Claims against and Equity Interests in the Debtors and other parties in interest. . . . [T]he Confirmation Hearing Notice was published, on April 14, 2005 in *USA Today* (National Edition), and on April 15, 2005 in *The New York Times* (National Edition), *The Wall Street Journal* (National Edition), and *The Globe and Mail* (National Edition). No other or further notice of the Confirmation Hearing was or is required.

Confirmation Order, 2005 Bankr. LEXIS 1113, at *3-6.

E. Under the Plan, holders of allowed general unsecured claims, which are classified in Class 4 (which voted to accept the Plan), received distributions of cash and stock in the reorganized Eddie Bauer anticipated to be worth approximately 91% of their allowed claims plus potential recoveries from a Creditor Trust. *See* First Amended Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the First Amended Joint Plan of Reorganization of Affiliated Debtors (the "*Disclosure Statement*") p. 15.

F. The Plan, *inter alia*, incorporated a settlement (the "*SHI Settlement*") among various parties, including the Debtors, their official unsecured creditors' committee, and Spiegel Holdings, Inc. ("*SHI*"). SHI was Spiegel's majority shareholder and sole voting shareholder and is an Affiliate of the Named Defendants. Pursuant to the SHI Settlement: (i) SHI

paid $104 million in cash to the Debtors; (ii) Otto KG and certain of its Affiliates retained approximately $26.9 million of general unsecured claims (the "*Otto KG Goods Unsecured Claims*") that were allowed as Class 4 Claims, but their recoveries on those claims were limited so they only would receive approximately 82.8% of their allowed claims (instead of the projected 91% for other Class 4 claims); and (iii) approximately $173.9 million in claims held by Otto-Spiegel Finance GmbH & Co. and SHI (the "*SHI Unsecured Claims*") were treated as claims solely against Spiegel on a non-substantively consolidated basis entitled to a distribution of 2.3% in cash (instead of the projected 91% for other Class 4 claims). Disclosure Statement pp. 9, 16. Thus, the total value of the concessions of Affiliates of the Named Defendants was not less than $260.4 million, representing the sum of: (a) $104 million in cash from SHI; (b) approximately $2.2 million in concessions on the Otto KG Goods Unsecured Claims; plus (c) approximately $154.2 in concessions on the SHI Unsecured Claims. In exchange for these and other concessions, the Plan provided for SHI, Otto KG, and their respective Affiliates—including all of the Named Defendants—(all of whom were among the "*SHI Released Parties*" under the Plan) to receive releases (the "*Plan Release*") from any and all claims arising on or before the Plan's "*Effective Date*" that: (i) the Debtors and their subsidiaries may hold against the SHI Released Parties; or (ii) the Debtors' creditors may hold against the SHI Released Parties related to the Debtors or their subsidiaries. Plan § 13.4.

G. In pertinent part, the Confirmation Order incorporated the Plan Release and enjoined the Debtors' creditors from asserting the released claims

(collectively, the "*Plan Release and Injunction*") and also made related findings and conclusions:

> 28. Rule 9019 SHI Settlement. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019, the Plan incorporates the SHI Settlement. *The SHI Settlement plays an important part in the Plan, and absent the releases and corresponding injunction that are critical components of the SHI Settlement, the Released Parties* (including, but not limited to, the Holders of the Otto KG Goods Unsecured Claims and the SHI Unsecured Claims) *would not be willing to enter into the SHI Settlement. The SHI Settlement* is the compromise of disputed claims and a good faith settlement and release of those claims and associated alleged injuries. *Such settlement*, as reflected in the relative distributions and recoveries of Holders of Allowed Claims under the Plan, (i) will save the Debtors and their estates the costs and expenses of prosecuting various disputes, the outcome of which is likely to consume substantial resources of the Debtors' estates and require substantial time to adjudicate and (ii) *have facilitated the creation and implementation of the Plan and benefits the Debtors' estates and creditors.* Accordingly, such settlement is fair, equitable and reasonable.
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> * * *
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> 32. Releases, Exculpations and Injunctions. Pursuant to section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a), the settlements, compromises, releases, discharges, exculpations, and injunctions set forth in the Plan and implemented by this Confirmation Order,

including but not limited to the SHI Settlement, are fair, equitable, reasonable, in good faith and in the best interests of the Debtors and their estates, the Reorganized Debtors, the Creditor Trust Debtors, the Creditors' Committee, the Creditor Trust, Eddie Bauer Holdings, and Holders of Claims and Equity Interests. *The releases of non-Debtors under the Plan and related injunctions are fair to Holders of Claims and Equity Interests and are necessary to the proposed reorganization of the Debtors and the successful administration of their estates*, thereby satisfying the requirements of *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992), *In re Johns-Mansville*, 837 F.2d 89 (2d Cir. 1988), and *In re Ionosphere Clubs, Inc.*, 184 B.R. 648, 655 (S.D.N.Y. 1995). The record of the Confirmation Hearing and the Chapter 11 Cases is sufficient to support the releases, exculpations and injunctions provided for in Article XIII of the Plan.

* * *

37. Provisions of Plan and Order Nonseverable and Mutually Dependent. The provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are nonseverable and mutually dependent.

* * *

41. Binding Effect. Pursuant to section 1141 of the Bankruptcy Code, except as otherwise expressly provided in the Plan, on and after the Effective Date, the Plan and all exhibits thereto

. . . shall bind all Holders of Claims and Equity Interests.

* * *

52. SHI Settlement. The SHI Settlement is a good faith settlement and release of claims and associated alleged injuries, is fair and reasonable and is accordingly approved in all respects pursuant to Bankruptcy Rule 9019(a) and section 1123(b)(3)(A) of the Bankruptcy Code. This Court has found that (a) the SHI Settlement was reached as a result of arm's-length good faith negotiations among the parties, (b) *the SHI Settlement plays a vital part in the Plan, and absent the releases and corresponding injunctions that are critical components of the SHI Settlement, the Released Parties* (including, but not limited to, the Holders of the Otto KG Goods Unsecured Claims and the SHI Unsecured Claims) *would not be willing to enter into the SHI Settlement*, and (c) *such settlement*, as reflected in the relative distributions and recoveries of Holders of Allowed Claims under the Plan, (i) will save the Debtors and their estates the substantial costs and expenses of prosecuting various disputes, the outcome of which is likely to consume substantial re-sources of the Debtors' estates and require substantial time to adjudicate and (ii) *has facilitated the creation and implementation of the Plan and provided substantial benefits to the Debtors' estates and creditors.*

* * *

54. Section 13.4(b) Injunction On the Effective Date, *each Holder of a Claim* (but not shareholders or former shareholders of Spiegel, Inc.

solely in their capacity as shareholders or former shareholders of Spiegel, Inc. or any Governmental Unit) *are hereby permanently enjoined from asserting any and all claims*, obligations, suits, judgments, damages, rights, causes of action and liabilities whatsoever (including those arising under the Bankruptcy Code), whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity or otherwise, based in whole or in part on any act, omission, transaction, event or other occurrence taking place during the period beginning at the beginning of time through and including the Effective Date and *related to the Debtors* or their direct or indirect subsidiaries, including, but not limited, to Contribution Claims, against any of the Released Parties (the "Section 13.4(b) Injunction"). This Section 13.4(b) Injunction shall apply to: (i) any Person or Entity that is or was the Holder of a Claim on or after the Petition Date . . . .

55. Other Injunctions. All Persons or Entities that release claims pursuant to Sections 13.2, 13.3, 13.4 and 13.6 of the Plan are hereby permanently enjoined from (a) commencing or continuing in any manner any action or other proceeding of any kind on any such released claims except as otherwise permitted pursuant to Section 2.6 of the Plan; (b) enforcing, attaching, collecting or recovering by any manner or means of any judgment, award, decree or order on such released claims; and (c) creating, perfecting, or enforcing any encumbrance of any kind on such released claims. . . .

56. Releases. Except as otherwise expressly provided in the Plan, this Confirmation Order or

a separate order of this Court, the release provisions set forth in Article XIII of the Plan are approved.

* * *

86. Substantial Consummation Substantial consummation of the Plan shall be deemed to occur on the Effective Date.

Confirmation Order, 2005 Bankr. LEXIS 1113, at *31-34, 36-38, 48-53, 80-81 (emphasis added).

H. Hence, in entering the Confirmation Order, this Court found, *inter alia*, that: (a) the Plan Release and Injunction were "critical components" of the SHI Settlement, which played "a vital part in the Plan"; and (b) the Plan Release and Injunction were "necessary to the proposed reorganization of the Debtors and the successful administration of their estates." *Id.* ¶¶ 32, 52.

I. The Effective Date of the Plan was June 21, 2005. In connection with the Effective Date, over $260 million in cash and other consideration was contributed to the Debtors' estates on behalf of the SHI Released parties, which included all of the Named Defendants.

The Illinois Action

J. On January 30, 2004, Rosenbaum commenced the Illinois Action against the Named Defendants by filing a complaint in the Illinois Court. On October 25, 2004, Rosenbaum filed its First Amended Complaint (the "*Complaint*") in the Illinois Action. *See* Rosenbaum Memo, Exhibit 2. In the Complaint, Rosenbaum asserted a variety of claims (the "*Initial Copyright Claims*") against the Named Defendants related to the alleged improper use by Doosan and

Sumisho of photographs they received from Spiegel and upon which Rosenbaum alleges it holds the exclusive copyright. The Complaint also asserts that Otto KG is "vicariously liable" for the conduct of Spiegel, Doosan, and Sumisho.

K. The Complaint named Bradford Matson as a defendant in addition to the Named Defendants. Mr. Matson was sued as the Spiegel officer in charge of advertising and of Spiegel's relationship with Rosenbaum. Complaint ¶¶ 96, 99.

L. Also in the Illinois Action, both Doosan and Sumisho contested the Illinois Court's jurisdiction. The Illinois Court found it had jurisdiction over Doosan and Sumisho based on the relationship of the Copyright Claims to Spiegel. Memorandum Opinion and Order, Case No. 04 C767 (N.D. Ill. E. Div. September 26, 2005) (the "*Jurisdiction Opinion*") pp. 6-7. *See* Objection, Exhibit B.

M. Once they all had been served with the Complaint, the Named Defendants brought the Plan Release and Injunction to the Illinois Court's attention in November, 2005. *See* Rosenbaum Memo, Exhibit 4. After a hearing on November 29, 2005, the Illinois Court stayed the Illinois Action subject to any ruling from this Court regarding the scope and application of the Plan Release and Injunction. *See* Rosenbaum Memo, Exhibit 3.

N. Also addressed at the November 29 hearing was a motion of Rosenbaum and certain individuals for leave to file a Second Amended Class Action Complaint against, *inter alia*, the Named Defendants in the Illinois Action. *See* Reply, Exhibit A. Among the proposed plaintiffs for a subsequent proposed Second Amended Class Action Complaint in the

Illinois Action (the "*Class Action Complaint*") were Stupakoff and James. *See* Rosenbaum Memo, Exhibit 1. As drafted, the Class Action Complaint would add additional plaintiffs, an additional defendant, and additional causes of action to those included in the Complaint (collectively, with the Initial Copyright Claims, the "*Copyright Claims*"). The original motion for leave to file a Second Amended Class Action Complaint was continued and stayed pending Rosenbaum's request for relief from this Court. *See* Rosenbaum Memo, Exhibit 3.

The Motions

O. On May 4, 2006, more than five months after the Plan Release and Injunction were brought to the Illinois Court's attention, Rosenbaum filed the Motion [Docket No. 4405] and supporting Memorandum of Law in Support of the Motion of Peter Rosenbaum Photography Corporation ("*Rosenbaum Memo*") [Docket No. 4406]. Thereafter, the Named Defendants filed their Objection [Docket No. 4431], the parties agreed to a two week adjournment of the Hearing, and Rosenbaum filed its Reply [Docket No. 4433].

P. On June 21, 2006, Stupakoff and James filed their Adjournment Motion [Docket No. 4438]. Later that day, the Named Defendants filed their objection to the Adjournment Motion [Docket No. 4441].

CONCLUSIONS OF LAW

IT IS HEREBY DETERMINED THAT:

The Adjournment Motion

1. There is no basis for adjourning the June 22, 2006 hearing on Rosenbaum's Motion, particularly as: (a) the parties and the Court had expended

significant effort to prepare for the Hearing; (b) the Hearing had been adjourned once before; and (c) Rosenbaum, Stupakoff and James each were named as proposed co-plaintiffs in the Class Action Complaint sought to be filed in the Illinois Action. *See* Rosenbaum Memo, Exhibit 1. The Adjournment Motion is denied.

2. Stupakoff and James' alternative request, for a special finding that any ruling on Rosenbaum's Motion shall have no preclusive effect on any motion or pleading filed by Stupakoff and James, has no legal basis or foundation. The request for a special finding is denied.

Jurisdiction and Venue

3. This Court has jurisdiction over these chapter 11 cases pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan is a core proceeding under 28 U.S.C. § 157(b)(2) and this Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code. Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

4. A Bankruptcy Court also has inherent or ancillary jurisdiction to interpret and enforce its own orders, including the Confirmation Order, wholly independent of the statutory grant of jurisdiction under 28 U.S.C. § 1334. *Local Loan Co. v. Hunt*, 292 U.S. 234, 239 (1934). A Bankruptcy Court's jurisdiction continues post-confirmation to protect its confirmation decree, to prevent interference with the execution of a confirmed plan, and to otherwise aid in its operation. *In re Chateaugay Corp.*, 201 B.R. 48, 64 (Bankr. S.D.N.Y. 1996) (hereinafter "*Chateaugay*") (*citing In re Dilbert's Quality Supermarkets, Inc.*, 368 F.2d 922, 924 (2d Cir. 1966)).

Subject Matter Jurisdiction To Approve Third Party Plan Release

5. This Court has held that "'[f]or purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least "related to" the bankruptcy.'" *Chateaugay*, 201 B.R. at 63 (*quoting Michigan Employment Security Comm'n v. Wolverine Radio Co.*, 930 F.2d 1132, 1141 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992)). This Court further stated that the appropriate test for determining whether a claim is "related to" a debtor is "whether the outcome of a proceeding 'might have any "conceivable effect" on the bankrupt estate' or if the proceeding has 'any significant connection' with the bankrupt estate." *Chateaugay*, 201 B.R. at 63 (*quoting Publicker Indus., Inc. v. U.S.*, 980 F.2d 110, 114 (2d Cir. 1992)). This Court then interpreted the conceivable effect test to be "extremely broad" so as to "find related to jurisdiction in a wide variety of circumstances." *Chateaugay*, 201 B.R. at 63 (citations omitted); *see also In re Singer*, 2002 U.S. Dist. LEXIS 8609, at *14 (S.D.N.Y. 2002). Based on such analysis, this Court then held that it "has the power to enjoin [suits] against non-debtor third parties . . . where, as here, the actions against such third parties have at least a conceivable effect upon the Debtors or implicate the interpretation or enforcement of this Court's orders." *Chateaugay*, 201 B.R. at 66.

6. "'In bankruptcy cases, a Court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the Debtor's reorganization plan.'" *In re Metromedia Fiber Network*, 416 F.3d 136, 141 (2d Cir. 2005) (hereinafter "*Metromedia*") (quoting *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992)

(hereinafter "*Drexel*"); *In re XO Communications, Inc.*, 330 B.R. 394, 436-38 (Bank. S.D.N.Y. 2005). Courts also approve nondebtor releases when: (1) the estate received substantial consideration, *Drexel*, 960 F.2d at 293; (2) the enjoined claims were "channeled" to a settlement fund rather than extinguished, *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89, 93-94 (2d Cir. 1988); *In re A.H. Robins Co.*, 880 F.2d 694, 701 (4th Cir. 1989); (3) the enjoined claims would indirectly impact the Debtor's reorganization "by way of indemnity or contribution," *Id.*; or (4) the plan otherwise provided for the full payment of the enjoined claims, *Id.*; *Metromedia*, 416 F.3d at 142. In addition, nondebtor releases also may be tolerated if the affected creditors consent. *Id.* (*citing In re Specialty Equip. Cos., Inc.*, 3 F.3d 1043, 1047 (7th Cir. 1993)).

7. In entering the Confirmation Order and incorporating the Plan Release and Injunction, this Court found that the plan release and injunction were "critical components of the SHI Settlement" that played a "vital part in the plan" and were "necessary to the proposed reorganization of the Debtors and the successful administration of their estates." Confirmation Order ¶¶ 28, 32, 52, 2005 Bankr. LEXIS 1113, at *31-33 (Bankr. S.D.N.Y. May 25, 2005). Consequently, this Court had the power to enjoin creditors from bringing actions against the SHI Released Parties both because the Plan Release and Injunction played an important part in the Plan and because a substantial contribution to the Debtors' estates was made on behalf of the SHI Released Parties. *See Metromedia*, 416 F.3d at 141; *Drexel* 960 F.2d at 293.

8. Nonetheless, Rosenbaum contends this Court had "no subject matter jurisdiction over the [Copyright Claims] because such claims will have no practical or legal consequence for the Debtors." Rosenbaum Memo p. 10. Yet, the substantial contributions of cash and other consideration to the Debtors' reorganization—on behalf of the Named Defendants—were an essential component of the Plan. Those contributions provided for certain distributions that otherwise would not have been made available. In fact, the Disclosure Statement projected the Debtors' Plan would provide at least a 91% distribution to the Debtors' general unsecured creditors, whose claims were classified in Class 4, which voted to accept the Plan.

9. As to the Named Defendants sharing an identity of interest with the Debtors such that the Copyright Claims could impact the Debtors, the Named Defendants could have sought contribution and/or indemnification from Spiegel (or its officers and perhaps other Debtors) because, among other things, Spiegel provided the photographs to Doosan and Sumisho and authorized them to use the photos on the basis that use of the photographs was unrestricted. Such contribution claims would have impacted both the allocation of the Debtors' property among creditors (including, potentially, directors and officers' insurance policy proceeds) and altered the Debtors' liabilities. *See Hunnicutt Co. v. TJX Cos., Inc.*, (In re Ames Dept. Stores, Inc.), 190 B.R. 157, 160-161 (S.D.N.Y. 1995) (holding that the Court had jurisdiction over postpetition litigation between nondebtors and that litigation was "related to the bankruptcy case because the outcome of the dispute

has the potential to alter the distributic of the debtor's estate to creditors.") (emphasis added).[3]

10. Still another impact of the Copyright Claims on the Debtors results from the fact the alter ego type claims alleged by Rosenbaum as the sole or partial basis for the Copyright Claims asserted against the Named Defendants are by law property of the Debtors and the resolution of alter ego type claims was integral to the SHI Settlement incorporated into the Plan. *See Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 133 (2d Cir. 1993) ("[G]ranting the bankruptcy trustee exclusive standing to assert alter ego claims furthers the bankruptcy policy of ensuring that all similarly situated creditors are treated fairly: the alter ego action is based upon allegations that if proven would benefit all the debtor's creditors, i.e., making more assets available to satisfy the debtor's debts."); *In re Enron Corp.*, 2003 Bankr. LEXIS 330, at *11 (Bankr. S.D.N.Y. Apr. 17, 2003) ("the trustee or debtor-in-possession would have exclusive standing to maintain a Delaware corporation's alter ego claim of a general nature."). Accordingly, such claims directly impact the Debtors' rights and property. *See Chateaugay*, 201 B.R. at 64-65 (in which this Court stayed lawsuits against nondebtors due, *inter alia*, to concerns about the lawsuits' impact on the debtors' assets and cited *Wolverine* and *Hunnicutt* approvingly).

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[3] Rosenbaum argues that any such contribution or indemnification claims were released under the Plan and, therefore, there is no longer any risk to the Debtors. *See* Reply pp. 11-13. Nevertheless, the potential for such claims must be analyzed at the time of Plan confirmation. Otherwise, virtually no third party plan release would remain valid because in almost every instance the released third party provides a reciprocal release to the debtor.

11. As to the potential impact of the Copyright Claims on any copyrights of the Debtors related to Rosenbaum's photographs, Rosenbaum argues that "[i]t cannot be disputed . . . that Rosenbaum exclusively owns the copyrights in all photographs it created," Reply p. 10, and, therefore, Rosenbaum's pursuit of the Copyright Claims could not have any "conceivable effect" on the Debtors' estate to warrant subject matter jurisdiction. *See Chateaugay*, 201 B.R. at 63. Although Rosenbaum submitted affidavits of Peter Rosenbaum and Bradford Mattson supposedly supporting Rosenbaum's exclusive ownership of the relevant copyrights, *see* Reply, Exhibits B and C, there has been no fact discovery by the Named Defendants in the Illinois Action. Hence, it remains possible that the Named Defendants could show Spiegel had a claim to copyrights on the photographs. Indeed, such a conclusion would be consistent with the allegations in paragraphs 26 to 34 of the Affidavit of Bradford Matson that Spiegel provided Rosenbaum's photographs to the Named Defendants and authorized them to use the photos.[4] *See* Reply, Exhibit C. Thus, several defenses of the Named Defendants to the Copyright Claims could be based on the position that Spiegel owned the copyright on the disputed photos entirely or in part and, therefore, the Copyright Claims seek to impact property of the

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[4] Contrary to Rosenbaum's assertion, the acceptance of the truth of Rosenbaum's fact allegations for the purpose of considering the Motion does not require acceptance of Rosenbaum's legal conclusions or preclude consideration of the Named Defendants' potential defenses. *See* Reply p. 10. Otherwise, a creditor such as Rosenbaum asserting enjoined claims could divest the Bankruptcy Court of subject matter jurisdiction to enforce the injunction just by alleging facts and legal conclusions that would preclude such jurisdiction.

Debtors' estates. *See In re Wolverine Radio Co.*, 930 F.2d at 1143 (risk of collateral estoppel of debtor from litigation against nondebtor enough to confer jurisdiction); *In re Paris Indus. Corp.*, 132 B.R. 504, 507 (D. Me. 1991) (enjoining products liability suit against buyer of debtor's assets based on post sale incident because unless free and clear language of sale order was enforced, purchaser would have grounds to sue the debtor to seek rescission).

12. Consequently, it was appropriate for the Plan Release and Injunction to apply to the Copyright Claims.

The Copyright Claims Are "Related To" The Debtors

13. Rosenbaum argues that even if the Plan Release and Injunction are valid, they do not apply to the Copyright Claims because such claims are not "related to" the Debtors as required by the Plan's language. Nevertheless, any fair reading of the Complaint demonstrates the Copyright Claims are related to the Debtors, including Rosenbaum's allegations that: (a) "Spiegel" and certain of its employees entered into conspiracies with at least some of the Named Defendants to misuse Rosenbaum's copyrighted photographs; (b) the Spiegel executive in charge of advertising was actively involved in the alleged conspiracies to wrongfully use Rosenbaum's photos; (c) pursuant to those conspiracies, Spiegel improperly provided the Named Defendants with Rosenbaum's photos; and (d) Otto KG is "vicariously liable for the wrongful conduct of Spiegel". *See e.g.*, Complaint ¶¶ 1, 2, 8, 12, 96, 99, 128, 129, 133, 134, 142, 144, 210, 215, 219, 226. The Class Action Complaint expands on such allegations regarding the Debtors' involvement.

14. Such allegations demonstrate that rather than being "independent" of the Debtors' conduct, the Copyright Claims are based upon the Debtors' conduct entirely or almost entirely. The additional allegation that Doosan and Sumisho used Rosenbaum's photographs overseas once the conspiracy with Spiegel and its officers had been initiated and the photos had been provided by Spiegel, hardly serves to make the Copyright Claims unrelated to the Debtors. Rosenbaum, however, makes three arguments to show the Copyright Claims are not "related to the Debtors". The Court rejects these arguments.

15. Rosenbaum first argues that a claim is not "related to the Debtors" under the Plan unless a prerequisite for pursuit of the claim is initiation of a lawsuit against the Debtors. Rosenbaum Memo at 5. *See* Reply pp. 5-6 (Rosenbaum submits that its "direct claims" asserted against the Named Defendants for which no Debtor is named as a co-defendant are not "related to the Debtors"). Nonetheless, relevant case law is to the contrary. For example, this Court rejected an identical argument made by Rosenbaum when finding the Court could enjoin lawsuits against nondebtors even though the debtors were not named in those lawsuits:

> Adamson and Back contend that this cause of action [to enjoin their Virginia Action against nondebtors] should be dismissed because the Virginia Action "only seeks recovery against [LTV Vehicle] pursuant to the express terms of the Stipulation and Order and *no recovery is sought against any of the other Debtors*. Defendants' Brief p. 28. As set forth above, the Virginia Action and Adamson's threatened actions do constitute improper collateral attacks on

> this Court's orders. Moreover, since the Debtors are exposed to potential liability (e.g., through an indemnity claim by New AM General) and the other adverse effects set forth above, resulting from such collateral attacks, *the fact that the Virginia Action does not seek a direct imposition of liability against the Debtors (other than to the extent provided in the Stipulation and Order) is irrelevant.*

Chateaugay Corp., 201 B.R. at 68 (emphasis added). Thus, it is irrelevant that Rosenbaum chose not to name any Debtor as a defendant in any of the complaints against the Named Defendants or to file a proof of claim in these cases based on the Copyright Claims. Instead, the plain meaning of the "related to the Debtors" phrase in the Plan encompasses the Copyright Claims because, as found above, the Debtors are integral to the Copyright Claims.[6]

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[6] Contrary to Rosenbaum's suggestion, the phrase "related to" as used in the Plan has a broad meaning based on the very contract interpretation rules Rosenbaum espouses. "In many areas of law . . . the use of 'arising out of' language in a contract is considered unambiguous and viewed as reasonably supporting only a broad reading." *Nycal Corp. v. Inoco PLC*, No. 98-7058, 1998 WL 870192, at *2 (2d Cir. Dec. 9, 1998); *see also Richards v. Princeton Ins. Co.*, 178 F. Supp. 2d 386, 392-93 (S.D.N.Y. 2001) (in the context of insurance policies "[t]he term 'arising out of' is to be interpreted in a broad and comprehensive sense to mean originating from or growing out of . . . ") (internal quotations omitted). The phrase "related to" is even "broader in scope" than "arising out of," does not require a causal relation, has been found to be synonymous with phrases such as "in connection with" "associated with," "with reference to," and "with respect to," and is not ambiguous in spite of its breadth. *Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001); *see also Mehler v. Terminis Int'l Co.*, 205 F.3d 44, 49 (2d Cir. 2000) (finding arbitration clause containing "arising

16. Second, Rosenbaum argues that rules of contract interpretation should govern the Court's interpretation of the Plan and such rules require the Plan to be interpreted consistent with existing law. *See* Reply pp. 3-4. Based on that premise, Rosenbaum argues the Court must read limits into the "related to the Debtors" phrase in the Plan Release and Injunction because existing Second Circuit law under *Metromedia* prohibits a third party plan release from granting abusive "blanket immunity" allegedly inherent in a release of the Copyright Claims. *Id.* Yet *Metromedia* merely clarifies the standard for granting third party plan releases, rather than prohibiting any particular kind of release. *See* 416 F.3d at 141-42. Further, as established above, the Plan Release and Injunction were approved in accordance with the standard set forth in *Metromedia* and other Second Circuit precedent, such as *Drexel*.

17. Moreover, *Metromedia* does not stand for the proposition asserted by Rosenbaum. In effect, the

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out of or relating to" language to be "classically broad" and "precisely the kind of broad arbitration clause that justifies a presumption of arbitrability"); *In re Johns Manville Corp.*, 340 B.R. 49, 60 (S.D.N.Y. 2006) ("As the Bankruptcy Court concluded: 'The Court's repeated use of the term "arising out of" and "related to" were not gratuitous or superfluous; they were meant to provide the broadest [third party plan release] protection possible to facilitate global finality for Travelers as a necessary condition for it to make a significant contribution to the Manville estate.'") (*citing* 2004 WL 1876046, at *31.); *Vt. Pure Holdings, Ltd. v. Descartes Sys. Group, Inc.*, 140 F. Supp. 2d 331, 334-35 (D. Vt. 2001) (the "Second Circuit has . . . held that the ordinary meaning of the term 'related to' was clear, unambiguous, and quite broad . . . and . . . has been defined simply as 'connected by reason of an established or discoverable relation") (citation omitted).

Second Circuit did not interpret the third party plan release in that case so as to conform the release to the Second Circuit standard, but rather found that as written, the release failed to comply with the applicable standard. *See Metromedia*, 416 F.3d at 141-42. Similarly, Rosenbaum's reliance on *XO* is misplaced. The *XO* Court interpreted the third party plan release at issue based on then applicable law not because rules of contract interpretation required such an approach, but rather because the express language of the *XO* plan limited the scope of the release to what was then permissible under applicable law. *See In re XO Communications, Inc.* 330 B.R. at 439-41.

18. Third, Rosenbaum asserts that the Named Defendants effectively admitted the Copyright Claims do not relate to the Debtors because the Named Defendants did not file pleadings in this Court: (a) asserting the Copyright Claims were subject to the automatic stay in these cases; (b) commencing an adversary proceeding seeking to stay the Copyright Claims; or (c) removing Rosenbaum's action to this Court. Rosenbaum Memo at 6-7; Reply p. 7. As to the automatic stay, which only applies to claims against the Debtors, there is no requirement that a claim be subject to the automatic stay in order for the claim to be "related to" the Debtors. As to seeking a discretionary stay or removal of the Copyright Claims, those may be options, but the Named Defendants had no obligation to pursue them and, therefore, there could be no admission if such remedies were not sought. Regardless, the Plan Release and Injunction ultimately obtained by the Named Defendants and their Affiliates constitute the exact relief Rosenbaum suggests the Named Defendants need to have sought.

Estoppel

19. Even, however, if the Copyright Claims somehow were not "related to" the Debtors for purposes of interpretation of the Plan Release and Injunction or for evaluating whether subject matter jurisdiction exists, Rosenbaum would be precluded from asserting those arguments based on collateral estoppel and judicial estoppel arising from Rosenbaum's litigation of personal and subject matter jurisdiction in the Illinois Action.

20. The elements necessary for collateral estoppel here based on a determination in the Illinois Action are: "(1) the issues in both proceedings must be identical; (2) the issue must have been actually litigated and actually decided in the prior proceeding; (3) there must have been a full and fair opportunity to litigate the issue in the prior proceeding; and (4) the resolution of the issue must have been necessary to support a valid and final judgment on the merits." *U.S. v. U.S. Currency in Amount of $119,984*, 304 F.3d 165, 172 (2d Cir. 2002).

21. Rosenbaum concedes that all of the elements for collateral estoppel are present here other than the issues being identical. *See* Reply p. 9, n. 11. In effect: (a) the "related to" issue was "actually litigated and actually decided" in the Jurisdiction Opinion entered in the Illinois Action; (b) the Illinois Action provided "a full and fair opportunity to litigate" the "related to" issue; and (c) the Illinois Court's Jurisdiction Opinion was "necessary" to provide that Court with jurisdiction.

22. As to the issues being identical, Rosenbaum raises the following three points regarding the collateral estoppel impact of the Illinois Court's personal jurisdiction ruling, which found personal jurisdiction

over Doosan in Illinois based entirely on Doosan's alleged connection with Spiegel. Jurisdiction Opinion pp. 4-5, Reply pp. 8-9:

> (a) Rosenbaum argues that the Illinois Court never specified whether it found personal jurisdiction over Doosan based on the "arising out of" standard or the "related to" standard. That distinction, however, is irrelevant because "arising out of" is a subset of "related to". *See Coregis Ins. Co. v. Am. Health Found., Inc.*, 241 F.3d 123, 128 (2d Cir. 2001) (the phrase "related to" is even "broader in scope" than the phrase "arising out of"). Thus, a ruling under either standard would signify the claims against Doosan were "related to" the Debtors.
>
> (b) Rosenbaum suggests the two standards differ because personal jurisdiction is based on whether a defendant's contact is "related to" the controversy while application of the Plan Release and Injunction is based on whether the Copyright Claims "related to" the Debtors. Yet, Rosenbaum's theory is incorrect because the controversy and the Copyright Claims are identical and, in any event, the standards do not differ.
>
> (c) Rosenbaum argues that the Jurisdiction Opinion only covers Doosan on the personal jurisdiction issue. While that is true, as the Copyright Claims include similar allegations against the other Named Defendants, this distinction is irrelevant.

23. Notably, Rosenbaum does not even address the Illinois Court's ruling on subject matter jurisdiction. *See* Reply pp. 8-9. The Illinois Court found

subject matter jurisdiction to entertain the Complaint based entirely on Rosenbaum's allegations of unauthorized predicate acts by Spiegel that the Named Defendants allegedly knew of and induced. Jurisdiction Opinion pp. 6-7 ("In the instant case, any unauthorized reproduction of plaintiff's photographs by Spiegel is a violation of the Copyright Act within the United States and constitutes a predicate act of direct infringement."). Hence, there can be no dispute that the Illinois Court's subject matter determination resolved the issue of whether the Copyright Claims are "related to the Debtors". Consequently, Rosenbaum is subject to collateral estoppel on the "related to" issue.

24. The elements necessary for judicial estoppel to apply here based on the Jurisdiction Opinion are: "[1] the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and [2] the prior inconsistent position must have been adopted by the court in some manner." *Bates v. Long Island R. Co.*, 997 F.2d 1028, 1038 (2d Cir. 1993).

25. Rosenbaum concedes that all of the elements for judicial estoppel are present here other than the issues being identical; i.e., that Rosenbaum asserted a prior inconsistent position in the Illinois Action. *See* Reply p. 9, n. 11. Yet the same analysis applicable to collateral estoppel demonstrates that Rosenbaum asserted a prior inconsistent position in the Illinois Action. Accordingly, judicial estoppel also precludes Rosenbaum's "related to" argument.

Res Judicata

26. Once, as here, a confirmation order has become final and nonappealable, a collateral attack on

the order is precluded by *res judicata* principles and, therefore, the confirmation order is no longer subject to challenge based on the standard applicable to the initial approval of a third party plan release. *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938). In *Stoll v. Gottlieb*, the Supreme Court held that the doctrine of *res judicata* precludes a creditor from enforcing a guaranty obligation of a nondebtor once that obligation had been released pursuant to a plan of reorganization of the debtor/primary obligor that has been approved by a final, nonappealable order. The Supreme Court found that *res judicata* applied whether or not the bankruptcy court initially had the power to grant the release, reasoning as follows: "Every court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter . . . . [Thereafter,] the Court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact." *Id.* (citations omitted).

27. Based on *Stoll v. Gottlieb*, the Fifth Circuit held that the doctrine of *res judicata* prevents a creditor from enforcing a nondebtor's guaranty obligation that was released pursuant to a plan confirmed by a final, nonappealable order. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1054 (5th Cir. 1987). The Fifth Circuit reasoned that "[w]e read *Stoll* to mean, therefore, that at least in the case of a bankruptcy court's exceeding its statutory authority by releasing a guarantor of a debtor, the interest in finality surpasses any threat that courts will engage in drastic overreaching." *Id.* Hence, whether or not this Court properly approved the Plan Release and Injunction in connection with confirmation of the Plan, *res judicata* principles preclude a collateral attack on the Plan Release and Injunction now.

28. Rosenbaum, however, argues that it is not collaterally attacking the Confirmation Order, but merely seeking an interpretation of the Order. *See, e.g.*, Reply pp. 6, 13-15. Rosenbaum's three arguments in this regard are incorrect:

(a) Rosenbaum asserts that the Illinois Court "directed the parties to go to this Court to get an interpretative ruling" and, therefore, Rosenbaum's motion must be viewed as such an attempt. Reply p. 13 (citing Transcript attached as Exhibit A to the Reply). In fact, the Illinois Court found that the Plan Release and Injunction enjoined the Illinois Action unless Rosenbaum could obtain relief in this Court. *See* Reply, Exhibit A; Motion, Exhibit 3. Regardless, a direction by the Illinois Court to seek relief here cannot convert a collateral attack into a request for an interpretive ruling.

(b) Rosenbaum suggests that a collateral attack on a confirmation order only occurs when revocation of a confirmation order is sought based on fraud under section 1144 of the Bankruptcy Code. *See* Reply p. 15. While a request for relief based on fraud certainly is a collateral attack on a confirmation order, there are other types of collateral attacks as well. Here, among other things, Rosenbaum argues the Plan Release and Injunction were improperly approved because: (i) these case are not the type of "rare cases" *Metromedia* viewed as justifying a third party plan release; (ii) prior to entry of the confirmation order, there was inadequate disclosure that the Plan Release and Injunction would apply to the Copyright Claims; and (iii) equitable considerations should preclude such application.

See Reply pp. 4, 5, 18. Yet, prior to and in connection with confirming the Plan, this Court already determined that: (x) the Second Circuit standard for approval of a third party plan release was satisfied here; (y) there was adequate disclosure and notice regarding confirmation of the Plan; and (z) the SHI Settlement "is fair, equitable and reasonable". Confirmation Order ¶¶ G, I, 28, 32, 52.

(c) Rosenbaum contends that *In re XO Communications, Inc.* authorizes postconfirmation interpretation of third party plan releases so they conform with then applicable law. *See* Reply p. 15. Yet *XO* is readily distinguishable because the release at issue was limited "to the fullest extent permitted by law as such law may be extended or interpreted subsequent to the Effective Date." 330 B.R. at 439-41. Hence, unlike here, interpretation of the *XO* plan release in accordance with applicable law was required by the language of the release. Moreover, the *XO* decision actually supports enforcement of the Plan Release and Injunction here because *XO* upheld application of a third party plan release to protect a creditor on whose behalf a substantial contribution was made to the debtor's estate and who had released a potential claim against the debtor for indemnification or contribution. *Id.*

29. Alternatively, Rosenbaum asserts that *Stoll v. Gottlieb* and *res judicata* principles are inapplicable here for four reasons. *See* Reply pp. 16-17. Rosenbaum's first purported distinction, that Rosenbaum only seeks an interpretative ruling of rather than

makes a collateral attack on the Confirmation Order, is rejected above.

30. Rosenbaum's second asserted distinction, that *Stoll* involved greater disclosure of the claim released in the plan at issue, is insignificant because there is no requirement in *Stoll* or Second Circuit cases addressing third party plan releases for such disclosure. *See, e.g., Corbett v. MacDonald Moving Servs.*, 124 F.3d 82, 85-87 (2d Cir. 1997) (upholding application of third party plan release to pension liability asserted against debtor's parent despite no pre-confirmation disclosure expressly stating that the release covered the pension claim).[6]

31. Rosenbaum's third alleged "distinction" of *Stoll* is that *res judicata* does not apply here because the Named Defendants did not list the elements of *res judicata*. Yet those elements are readily established here: (a) the Confirmation Order was a final

---

[6] There are multiple other reasons why such disclosure was unnecessary. The plain language of the Plan Release and Injunction signified they covered the Copyright Claims. Further, as Rosenbaum argues the Copyright Claims were unimportant prior to Plan Confirmation, *see* Reply p. 18, there would not have been the sense at that time that the Copyright Claims were of sufficient magnitude to warrant express disclosure. Also, Rosenbaum's argument that the Copyright Claims should have been discussed in the Disclosure Statement, which would not have been sent to purported class plaintiffs who did not file a claim in the Spiegel cases or have their claims scheduled by the Debtors, is inconsistent with Rosenbaum's assertion in the Class Action Complaint, 344, that Rosenbaum's claims were typical of the claims of all class plaintiffs. Additionally, the disclosure cases cited by Rosenbaum such as *In re Wolfson*, 139 B.R. 279 (Bankr. S.D.N.Y. 1992), are inapplicable here because they merely require individual debtors not to hide any of their assets.

judgment; (b) this Court is a court of competent jurisdiction to enter the Confirmation Order; (c) the Confirmation Hearing involved the same parties, i.e., the Named Defendants and creditors of the Debtors such as Rosenbaum; and (d) the Confirmation Hearing involved the same claims, i.e., the Plan Injunction and Release applies to the Copyright Claims.

32. Rosenbaum's fourth attempted distinction is that application of *res judicata* also requires a determination that pursuit of the Copyright Claims "would impair, destroy, challenge, or invalidate the enforceability or effectiveness of the reorganization plan." Reply p. 17 (*citing Sure-Snap Corp. v. State Street Bank and Trust Co.*, 948 F.2d 869, 875-76 (2d Cir. 1991)). Whether or not that is required, it is apparent here that invalidation of the Plan Release and Injunction and loss of the related SHI Settlement consideration exceeding $260 million would impair, destroy, and invalidate the Plan, even if it were possible to implement such steps now.

Equitable Mootness

33. Even without application of *res judicata* principles, courts consistently find that when, as here, a plan has been "substantially consummated," the related confirmation order no longer is subject to review. *See, e.g., Metromedia*, 416 F.3d at 144 (Second Circuit holds that appeal of order confirming a "substantially consummated" plan that included a third party release is equitably moot even though the Second Circuit found that the release in question should not have been approved in the first instance); *In re Loral Space & Communications Ltd.*, 342 B.R. 132, 137-38 (S.D.N.Y. 2006) (dismissing appeal of confirmation order as being equitably moot, based largely on the presumption of equitable mootness and

the appellant's failure to seek a stay of the confirmation order); *In re Trico Marine Services, Inc.*, 343 B.R. 68 (Bankr. S.D.N.Y. 2006) (denying request for plan revocation because "even if [the movant] could prove fraud, the Court could not fashion a remedy that would satisfy the requirements of § 1144." Among other reasons, stock had been issued to creditors under the *Trico Marine* plan and such stock subsequently was traded, which is exactly what has occurred in the Debtors' cases).

34. A plan has been "substantially consummated" when, as here, substantially all of the property proposed to be transferred pursuant to the plan has in fact been transferred, the reorganized debtor has assumed control of the business, and plan distribution has commenced. *Metromedia*, 416 F.3d at 144. Indeed, paragraph 86 of the Confirmation Order expressly provides that "[s]ubstantial consummation of the Plan shall be deemed to occur on the Effective Date." As the Plan's Effective Date has occurred, the Plan was substantially consummated. Therefore, Rosenbaum's Motion is equitably moot.

Equitable Considerations

35. As established above, even if the equities were relevant to the initial approval of a third party plan release, at this point, Rosenbaum's equitable arguments are collateral attacks on the Confirmation Order, which, *inter alia*, found the SHI Settlement to be fair and equitable. Regardless, Rosenbaum's equitable arguments are to no avail:

> (a) Rosenbaum argues the release of the Copyright Claims in particular was not important to the Debtors' reorganization and, therefore, is not covered by the Plan Release and Injunction. Rosenbaum Memo pp. 19-20; Reply

pp. 18-20. Nonetheless, the language of the Plan Release does not distinguish between important and unimportant claims. Moreover, whether or not Rosenbaum's contention is true begs the question. Instead, the issue is whether the Plan Release and Injunction and the related SHI Settlement consideration each were important as whole to the Spiegel cases, not whether each individual claim released was important. There is no question about such aggregate importance, as this Court expressly found. Confirmation Order, 2005 Bankr. LEXIS 1113 at *31.

(b) Rosenbaum contends the Copyright Claims could not be released if the SHI Settlement consideration did not directly reach Rosenbaum on account of the enjoined Copyright Claims. *See* Reply pp. 20-21. Yet, the Second Circuit has rejected that exact argument:

> Appellants also claim that notwithstanding any other limitation on nondebtor releases, good and sufficient consideration must be paid to any enjoined creditor. *Such consideration has weight in equity, but it is not required.* In *Drexel Burnham* the complaining creditors received *none* of the settlement with Drexel's personnel. 950 F.2 at 289, 293.

Metromedia, 416 F.3d at 143 (emphasis added). Notably, this Court specifically found the Plan Release was fair and necessary. Confirmation Order, 2005 Bankr. LEXIS 1113, at *31, 33.[7]

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[7] Moreover, the distribution to all creditors (including Rosenbaum and/or the assignee of its claim) of the substantial settlement consideration contributed on behalf of the Named Defendants and their Affiliates made particular sense here, as key

(c) Rosenbaum argues that Sumisho and Doosan may not benefit from the Plan Release and Injunction because they did not directly contribute to the SHI Settlement. See Reply p. 21. Nevertheless, the making of a single contribution on behalf of multiple beneficiaries of a third party plan release is both customary and acceptable. *See, e.g., In re XO Communications, Inc.*, 330 B.R. at 439-40.

(d) Rosenbaum contends that it should not be subject to the Plan Injunction and Release because Rosenbaum has not had its day in court regarding the Copyright Claims. Yet the notion that each creditor must have fully litigated its claim is unfounded and mutually inconsistent with the concept of a third party plan release.

36. Moreover, Rosenbaum's contention completely ignores the equities favoring the Named Defendants. For example, over $260 million in cash and other consideration already has been contributed to the Debtors' estates on behalf of the Named Defendants and their Affiliates. Further, numerous actions have been taken by all parties in reliance on those contributions and the substantial consummation of the Plan. Also, it appears Rosenbaum made a calculated decision not to file a proof of claim based on the Copyright Claims or to otherwise participate in these cases until now to challenge the Plan Release and Injunction.

37. Accordingly, equitable considerations are of no benefit to Rosenbaum.

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claims asserted against such parties—including those of Rosenbaum—relied in large part on alter ego and other theories assertable for the benefit of all of the Debtors' creditors.

DECREES

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The findings of fact and conclusions of law of this Court set forth herein and at the Hearing shall constitute findings of fact and conclusions of law pursuant to Bankruptcy *Rule 7052*, as made applicable herein by Bankruptcy *Rule 9014*. The findings of fact and conclusions of law of this Court at the Hearing are incorporated herein by reference. To the extent that any of the foregoing findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the foregoing conclusions of law constitute findings of fact, they are adopted as such.

2. Stupakoff and James' Adjournment Motion is denied in all respects.

3. The Plan Release and Injunction release the Named Defendants from and enjoin pursuit of the Copyright Claims.

4. Rosenbaum's Motion is denied in all respects.

Dated: New York, New York

August 16, 2006

/s/ Hon. Burton R. Lifland
United States Bankruptcy Judge

APPENDIX E

ADDITIONAL STATUTORY PROVISIONS

Section 105(a) of the Bankruptcy Code, 11 U.S.C. § 105(a), provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Section 1144 of the Bankruptcy Code, 11 U.S.C. § 1144, provides:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud. An order under this section revoking an order of confirmation shall—
>
> (1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and
>
> (2) revoke the discharge of the debtor.

Federal Rule of Bankruptcy Procedure 7001 provides, in pertinent part:

> An adversary proceeding is governed by the rules of this Part VII. It is a proceeding in a bankruptcy court . . . (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a

> chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, . . . [or] (9) to obtain a declaratory judgment relating to any of the foregoing.

Federal Rule of Bankruptcy Procedure 9024 provides:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330.

No. 07-1552

IN THE

Supreme Court of the United States

FILED
JUL 14 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN RE: SPIEGEL INC., *et al.*,

Debtors.

BICO STUPAKOFF and RUSSELL JAMES,

Petitioners,

—v.—

OTTO DOOSAN LTD., OTTO SUMISHO INC. and OTTO (GmbH & Co KG),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioners, who in all three courts below did not rely on Fed. R. Civ. P. 60(b)(4) and repeatedly argued they did *not* contend the challenged confirmation order generally or its release and injunction provision specifically were void (so that none of the three lower courts addressed the voidness issue or Fed. R. Civ. P. 60(b)(4)), now may premise their petition for writ of certiorari on a voidness argument under Fed. R. Civ. P. 60(b)(4)?

II. Whether Petitioners fail to show a true conflict among the circuits regarding a party's need, after receiving actual notice of a bankruptcy court order releasing certain alleged claims of that party, to have acted within a "reasonable time" under Fed. R. Civ. P. 60(b)(4) in order to obtain relief from that order on the ground the party did not receive adequate advance notice of the challenged release?

III. Whether review by this Court would have no practical effect on this case because even if a known creditor of the debtors in these cases (the "*Debtors*") with a viable claim still could obtain relief from the Debtors' confirmation order based on inadequate notice, Petitioners waived their newfound Fed. R. Civ. P. 60(b)(4) argument, Petitioners were not known creditors of the Debtors, Petitioners' claims are barred by applicable statutes of limitation, and Petitioners have never sought to file late claims against the Debtors, which was the only relief that might have been available to Petitioners?

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the undersigned counsel for Respondents Otto (GmbH & Co KG), Otto Doosan Mail Order Ltd. and Otto Sumisho, Inc., certifies the following:

Otto (GmbH & Co KG) is a partnership organized under German law and, therefore, is not a nongovernmental corporate party. As such, Otto (GmbH & Co KG) has no parent corporation and no stock.

Otto Doosan Mail Order Ltd. (n/k/a OTTO-Shopping Limited) is a corporation organized under the laws of South Korea. Otto Doosan Mail Order Ltd. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Otto Sumisho, Inc. (n/k/a Otto Japan Inc.) is a corporation organized under the laws of Japan. Otto Sumisho, Inc. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions included in and appended to the Petition for Writ of Certiorari, the pertinent provisions of Section 1141(a) of the Bankruptcy code, 11 U.S.C.A. § 1141 (a), Federal Rules of Bankruptcy Procedure, Rule 8002, and 28 U.S.C.A. § 1334 are reproduced in the Appendix hereto at 81a-86a.

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Otto (GmbH & Co KG) ("*Otto KG*"), Otto Doosan, Ltd., and Otto Sumisho, Inc. (together, "*Respondents*") submit this Brief in Opposition to the Petition for Writ of Certiorari ("*Petition*") filed by Petitioners, Bico Stupakoff and Russell James (collectively, "*Petitioners*").

STATEMENT OF THE CASE[1]

This appeal concerns Petitioners' attempt, more than three years after confirmation of the Debtors' reorganization Plan in the Spiegel chapter 11 cases, to obtain an unwarranted special exemption from the Release granted to Respondents that was incorporated in and integral to the Plan. The Release was approved by the Bankruptcy Court based, in part, on over $260 million of consideration delivered on behalf of Respondents to the Debtors, which enabled their creditors to recover almost (or totally) in full on their over $1.3 billion of claims. Petitioners acknowledged their claims against Respondents are barred by the Release's language and effectively conceded the Bankruptcy Court had jurisdiction and power to approve the Release generally. Rather, Petitioners argued the Release should not be enforceable against Petitioners because they allegedly were known creditors of the Debtors who received publication notice of the Release rather than actual notice by mail.

Petitioners waited at least seven months after receiving actual notice of the Release to seek

[1] Capitalized terms in the Statement of the Case have the definitions ascribed to such terms in the Statement of Facts.

relief. Specifically, Petitioners sought a declaratory judgment Petitioners were known creditors of the Debtors when their Plan was confirmed despite conceding: (a) Petitioners' alleged claims were not reflected on the Debtors' books and records; (b) Petitioners neither asserted nor filed their copyright claims against the Debtors (or anyone else including Respondents); and (c) until filing their declaratory judgment action, Petitioners had never appeared in the Debtors' chapter 11 cases. Moreover, although Petitioners could have sought to file late claims in the Debtors' chapter 11 cases and, if such claims were meritorious, would have recovered nearly or totally in full from the Debtors, Petitioners never pursued claims against the Debtors (even though Petitioners allege it was the *Debtors* that both failed to provide Petitioners with appropriate notice and were primarily responsible for the asserted "improper" use of Petitioners' photographs).

The Bankruptcy Court exercised its discretion not to entertain Petitioners' complaint seeking declaratory relief because Rule 60(b)(3), (5), or (6) governed the relief Petitioners requested. Further, the Bankruptcy Court found Petitioners' belated Complaint failed to satisfy Petitioners' burden under Rule 60(b), particularly as Petitioners failed to act for at least seven months after receiving notice of the Release. Alternatively, the Bankruptcy Court dismissed Petitioners' Complaint because it was based on allegations that were conclusory or that either could not lead to, or were inconsistent with, the inference Petitioners were "known creditors" of

the Debtors. The District Court and Second Circuit (unanimously) affirmed the Bankruptcy Court's decision.

Petitioners now suggest a basis for granting certiorari exists due to an alleged split among the circuits as to whether a court may deny a Rule 60(b)(4) motion based on voidness when the movant fails to seek relief within a reasonable time. Petitioners request is unfounded, however, because in all three courts below Petitioners never relied on Rule 60(b)(4), repeatedly stated they did not assert either the Confirmation Order or the Release were void, acknowledged they had to act within a reasonable time, and none of the three lower court's decisions addressed voidness or a request for relief under Rule 60(b)(4). Further, the circuit split alleged by Petitioners is nonexistent. Moreover, as there are multiple reasons Petitioners are not entitled to relief, there is no practical purpose for review by this Court. Consequently, Petitioners' request for certiorari should be denied.

STATEMENT OF FACTS

A. The Debtors' Chapter 11 Plan

On March 17, 2003, each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "*Bankruptcy Code*") in the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*").

By order, dated May 25, 2005 (the "*Confirmation Order*"), the Bankruptcy Court, after notice

and a hearing (the "*Confirmation Hearing*"), confirmed the Debtors' chapter 11 plan (the "*Plan*"), which had been overwhelmingly accepted by the Debtors' thousands of creditors. A-117; *see* A-130 (¶ 16).[2] Notice of the Confirmation Hearing was provided by the Debtors, who had that obligation. Regarding that notice, the Confirmation Order included, *inter alia*, the following findings:

> I. *Adequate and sufficient notice of the Confirmation Hearing* and other requirements and deadlines, hearings and matters described in the Disclosure Statement Order *was provided in compliance with the Bankruptcy Code*, the Bankruptcy rules and the Disclosure Statement Order . . . . [T]he Confirmation Hearing Notice was mailed on or about April 5, 2005 to Holders of Claims against and Equity Interests in the Debtors and other parties in interest . . . . [T]he Confirmation hearing Notice was published, on April 15, 2005 in USA *Today* (National Edition), and on April 15, 2005 in *The New York Times* (National Edition), *The Wall Street Journal* (National Edition), and *The Globe and Mail* (National Edition). *No other or further notice of the Confirmation hearing was or is required.*

A-119-20 (emphasis added).

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[2] "A-___" refers to the documents listed in the parties' Second Circuit Joint appendix (volumes I and II). References to the documents attached to this Opposition Brief shall be in the form of "App. __." References to the documents attached to the Petition shall be in the form of "Pet. App. __."

The Plan's effective date (the "*Effective Date*"), on which the distribution of over $1 billion in cash and stock commenced, was June 21, 2005. A-705 (August Opinion ¶ I). As disputed claims against the Debtors were resolved over time, the amounts reserved for disallowed claims were freed up and distributed to holders of valid claims. Although for years Petitioners have had the opportunity to seek to share in such distributions, Petitioners inexplicably have failed to pursue that option.

The Plan, *inter alia*, incorporated a settlement (the "*SHI Settlement*") among various parties, including the Debtors and their official unsecured creditors' committee, on one hand, and Spiegel Holdings, Inc. ("*SHI*") and Otto KG, on the other hand. A-701-02 (*Id.* ¶ F). SHI was Spiegel Inc.'s majority and sole voting shareholder as well as an Affiliate[3] of Respondents. *Id.* Pursuant to the SHI Settlement, over $260 million of cash and other consideration was provided by and on behalf of Respondents and their Affiliates for the benefit of the Debtors and their creditors. *Id.* As a result, the Debtors' unsecured creditors, who held claims aggregating in excess of $1.3 billion, were projected to receive recoveries *exceeding 91%* of their claims. A-701 (*Id.* ¶ E). In exchange for these and other concessions, the Plan provided for SHI, Otto KG, and their respective Affiliates—including the other Respondents (collectively, the "*SHI Released Parties*")—to receive a release (the "*Plan Release*") from all

[3] As used herein, the terms "Affiliates" and "Affiliate" shall have the meanings ascribed to them in the Plan and the Bankruptcy Code.

claims arising on or before the Plan's Effective Date that, *inter alia*, the Debtors' creditors may hold against the SHI Released Parties related to the Debtors. A-103-05 (Plan § 13.4).

The Confirmation Order incorporated the Plan Release and enjoined the Debtors' creditors from asserting the released claims (collectively, the "*Release*" or "*Release and Injunction*") through, *inter alia*, the following findings and rulings:

- "The SHI Settlement plays an important part in the Plan, and absent the releases and corresponding injunction that are critical components of the SHI Settlement, the Released Parties . . . would not be willing to enter into the SHI Settlement."
- "The releases of non-Debtors under the Plan and related injunctions are fair to Holders of Claims and Equity Interests and are necessary to the proposed reorganization of the Debtors and the successful administration of their estates, . . . "
- "The Provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are non-severable and mutually dependent."
- "On the Effective Date, each Holder of a Claim . . . are [sic] hereby permanently enjoined from asserting any and all claims, . . . whether known or unknown . . . related to the Debtors . . . against any of the Released Parties."

- "Except as otherwise expressly provided in the Plan, this Confirmation Order or a separate order of this Court, the release provisions set forth in Article XIII of the Plan are approved."

A-134-37, A-146-47 (¶¶ 28, 32, 37, 54, 56).[4]

B. The Illinois Action

On January 30, 2004, Peter Rosenbaum Photography Corporation ("*Rosenbaum*") commenced an action (the "*Illinois Action*") solely on Rosenbaum's behalf against Respondents by filing a complaint in the United States District Court for the District of Illinois (the "*Illinois Court*"). A-706 (August Opinion ¶ J). Petitioners have alleged that "[t]he gravamen of [Rosenbaum's] Complaint was that [Respondents] unlawfully procured and published pictures taken by [Rosenbaum] without paying for the use of those pictures." A-548 (Complaint ¶ 20). Respondents contested these allegations and the Illinois Court's jurisdiction. In connection with the jurisdictional dispute, Rosenbaum took limited discovery from July 2004 through March 2005. A-906 (Motion for Leave to File Second Amended Class Action Complaint ¶ 7). Based on that discovery, in early November 2005, Rosenbaum sought (but did not obtain) leave of the Illinois Court to file an amended Complaint (the "*Proposed Class Complaint*"), A-206, that, *inter alia*, would have added a "class" of plaintiffs (*including Petitioners* as named plaintiffs) to the Illinois Action. A-706-07 (August Opinion ¶ N).

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[4] Petitioners do not contest that Respondents are included among the "Released Parties."

In early November 2005, as soon as all Respondents had been served in the Illinois Action, Respondents brought the Release to the Illinois Court's attention. A-706 (*Id.* ¶ M). On November 29, 2005, the Illinois Court stayed the Illinois Action, denied Rosenbaum leave to file the Proposed Class Complaint, and advised that no such litigation could proceed absent a ruling from the Bankruptcy Court that such litigation was not covered by the Release and Injunction. *Id.*[5]

C. The Rosenbaum Motion and Petitioners' Motion to Continue

On May 4, 2006, Rosenbaum filed in the Bankruptcy Court a motion (the "*Rosenbaum Motion*") seeking an order declaring Rosenbaum's claims asserted in the Illinois Action were not barred by the Release. A-707 (*Id.* ¶ O). On the eve of the June 22, 2006 hearing on the Rosenbaum Motion, Petitioners *first appeared* in the Bankruptcy Court by filing a motion seeking either to adjourn that hearing or to obtain a special finding that any ruling on the Rosenbaum Motion would not impact Petitioners' claims against Respondents (the "*Motion to Continue*"). A-707 (*Id.* ¶ P). On August 16, 2006, the Bankruptcy Court issued its Findings of Fact,

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[5] Quoting a document *not* in the Record, Petitioners observe that in November 2005, the Illinois Court warned Rosenbaum and prospective class plaintiffs not to pursue litigation in the Illinois Court without *first* obtaining relief from the Bankruptcy Court. *See* Petition at 7-8. Nevertheless, *Petitioners* inappropriately seek to rely on Rosenbaum's April 2006 motion *again* asking the Illinois Court for permission to file a class complaint as the point from which Petitioners' delay in seeking relief should be measured. *See id.* at 8.

Conclusions of Law, and Order Denying the Rosenbaum Motion and Petitioners' Motion to Continue (the "*August Opinion*"). A-698.

D. Petitioners' Complaint and Plan Modification Motion

On June 21, 2006, more than seven months after the Release was brought to the Illinois Court's (and Petitioners') attention, *see* A-1470 (November Opinion at 8), Petitioners filed a complaint ("*Complaint*") in the Bankruptcy Court seeking a declaratory judgment that the Release was unenforceable as to Petitioners. A-524. Respondents filed a motion to dismiss Petitioners' Complaint for failure to state a claim ("*Motion to Dismiss*"). A-742. In their response, Petitioners never asserted the Confirmation Order or Release were void and did not rely on Rule 60(b)(4).[6] *See* A-812.

On November 1, 2006, the Bankruptcy Court issued an opinion (the "*November Opinion*") granting Respondents' Motion to Dismiss and denying Petitioners' Plan Modification Motion. A-1475 (November Opinion at 13). The Bankruptcy Court exercised its discretion not to entertain Petitioners' Complaint for declaratory relief

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[6] On August 30, 2006, Petitioners filed a motion ("*Plan Modification Motion*") solely pursuant to Rule 60(b)(5) and (6), as made applicable herein by Bankruptcy Rule 9024, seeking to modify the Plan and Release to permit Petitioners to file a class complaint against Respondents (although no proposed complaint was tendered) so as to toll certain unidentified statute(s) of limitations that "may" be applicable to Petitioners' unspecified claims. *See* A-730; A-1408-09 (10/18/06 Transcript at 11-12); A-848 (Opposition to Plan Modification Motion).

because Rule 60(b)(3), (5), or (6) governed the relief Petitioners requested. Further, the Bankruptcy Court found Petitioners' belated Complaint failed to satisfy Petitioners' burden under Rule 60(b), particularly as Petitioners failed to act for at least seven months after receiving notice of the Release. Alternatively, the Bankruptcy Court dismissed Petitioners' Complaint because it was based on allegations that were conclusory or that either could not lead to, or were inconsistent with, the inference Petitioners were "known creditors" of the Debtors. The November Opinion did not consider or rule upon voidness or Rule 60(b)(4).

E. Petitioners' Appeals

Petitioners appealed the November Opinion without asserting voidness or Rule 60(b)(4). *See* Brief of Appellants Bico Stupakoff and Russell James, S.D.N.Y. No. 03-11540 (BRL), dated Dec. 15, 2006 (appealing dismissal of adversary proceeding) (*"Petitioners' District Court Brief"*). On February 28, 2007, the United States District Court for the Southern District of New York (the *"District Court"*) affirmed the Bankruptcy Court's November Opinion. Pet. App. at 6a. The District Court found dismissal of Petitioners' Complaint under Fed. R. Civ. P. 12(b)(6) was appropriate because Petitioners "have not sufficiently pled that they were known creditors of Spiegel upon confirmation of the Plan." and instead merely pled "conjecture or speculation." *Id.* at 8a-9a. The District Court further noted Petitioners had no chance of satisfying their burden of showing the Bankruptcy Court abused its discretion by denying relief under Rule 60(b) and the Declaratory

Judgment Act. *See id.* at 9a n. 3. The District Court never considered or ruled upon Rule 60(b)(4) or voidness.

On March 13, 2008, the United States Court of Appeals for the Second Circuit issued a Summary Order (the "*Opinion*") unanimously affirming the District Court's judgment. *See id.* at 1a. The Second Circuit found the Bankruptcy Court did not abuse its discretion in either denying Petitioners' request for declaratory judgment as "untimely" or as a "collateral attack on the Plan" governed by Rule 60(b)(3), (5), or (6) that was not brought within a "reasonable time." *Id.* at 3a-4a. The Second Circuit did not rule based upon Rule 60(b)(4) or voidness.

REASONS FOR DENYING THE PETITION

I. PETITIONERS MISREPRESENT THE ISSUE PRESENTED BELOW TO FABRICATE A BASIS FOR REVIEW BY THIS COURT.

According to Petitioners, they "ask the Court to review" whether "the court of appeals departed from fundamental principles of due process in endorsing the minority position that an action seeking relief from a void judgment must be brought within a reasonable time." Petition at 11-12. Indeed, the entire focus of the Petition is the newfound assertion that Petitioners sought relief from a "void" judgment under Rule 60(b)(4). Yet, that challenge was not litigated in (or decided by) any of the three courts below and was

not even mentioned by Petitioners on appeal until Petitioners' Reply in the Court of Appeals.

A. When Petitioners Filed Their Complaint, The Confirmation Order And Release Provision Were No Longer Subject To Challenge.

Petitioners never challenged and effectively conceded that the Bankruptcy Court had jurisdiction and power to approve the Release. As to jurisdiction, 28 U.S.C. § 1334(b) provides "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." As to power, governing bankruptcy law permits approval of a nondebtor release such as the Release.[7] *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 293 (2d Cir. 1992) ("In bankruptcy cases, a court may enjoin a creditor from suing a third party, provided the injunction plays an important part in the debtor's reorganization plan.") (citation omitted).

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[7] The broad scope of the Bankruptcy Clause, contained in article I, section 8 of the Constitution, is well-established. *See* U.S. Const. art. I, § 8, cl. 4. Pursuant to the Bankruptcy Clause, Congress enacted in the current Bankruptcy Code: (i) section 105(a), entitled "Power of court," which provides that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title"; (ii) section 1123(b)(6), entitled "Contents of plan," which provides that "a plan may—include any other appropriate provision not inconsistent with the applicable provisions of this title"; and (iii) section 1141(a), entitled "Effect of confirmation," which provides that "the provisions of a confirmed plan bind . . . any creditor." 11 U.S.C. §§ 105(a), 1123(b), 1141(a).

Even, however, if the Bankruptcy Court had lacked such jurisdiction and power, Petitioners no longer could have challenged them directly. First, any such challenge would have been barred by *res judicata*. *See Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) (*res judicata* precludes collateral attack on final nonappealable confirmation order based on assertion the order should not have included a release of a non-debtor's guaranty obligation); *Republic Supply Co. v. Shoaf*, 815 F. 2d 1046, 1054 (5th Cir. 1987) (same). Second, such a collateral attack also would have been barred by the equitable mootness doctrine. *See, e.g., In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 145 (2d Cir. 2005) (rejecting appeal of improperly approved non-debtor plan release based on equitable mootness, reasoning, in part, that "[e]ven if we could carve out appellants' claims from the non debtor releases, we would not do so. If appellants' claims are substantial (as they urge), it is as likely as not that the bargain struck by the debtor and the released parties might have been different without the releases") (citation omitted).

Additionally, Petitioners' newfound argument ignores that in these bankruptcy cases, Petitioners rely not on Rule 60(b) in isolation, but on Federal Rule of Bankruptcy Procedure 9024 ("*Rule 9024*"). Rule 9024 provides that "Rule 60 F. R. Civ. P. applies in cases under the [Bankruptcy] Code except that . . . (3) a complaint to revoke an order confirming a plan only may be filed within the time allotted by § 1144 or § 1330." Section 1144 of the Bankruptcy Code exemplifies the paramount importance of finality

in bankruptcy cases by providing that a plan confirmation order may be revoked "if and only if such order was procured by fraud," and even then, only if such revocation is sought by a motion filed "before 180 days after the date of entry of the order of confirmation." 11 U.S.C. § 1144. Since seeking a declaration the Confirmation Order was void would have amounted to seeking revocation of the Plan, any such attempt by Petitioners would have been prohibited under both section 1144 and Rule 9024 because Petitioners did not allege fraud and more than 180 days had passed since entry of the Confirmation Order.

Accordingly, until now (when Petitioners are trying to concoct a basis to seek certiorari), Petitioners repeatedly stated, when addressing Respondents' Motion to Dismiss Petitioners' Complaint and in the related appeals, that Petitioners did *not* assert the Confirmation Order generally or the specific Release provision contained therein were void or that Rule 60(b)(4), made applicable herein by Rule 9024, was the basis for Petitioners' argument:

- "[Petitioners] are not seeking to void, rescind or otherwise alter the confirmation order. Rather they are seeking a declaration that, because of the lack of notice and due process afforded, the Release and Injunction cannot be enforced against them." A-830 (Petitioners' Bankruptcy Court Brief at 19).
- "[Petitioners] do not seek a declaration that a plan provision is void *ab initio*. Rather they seek a far narrower deter-

mination that a specific plan provision cannot be enforced against them due to lack of notice." Petitioners' District Court Brief at 12.

- "Nothing in this case suggests that . . . Fed. R. Civ. P. 60(b) is applicable to [Petitioners'] constitutional claims, ..." Reply Brief of Appellants Bico Stupakoff and Russell James, S.D.N.Y. No. 03-11540 (BRL), dated Jan. 8, 2007 (appealing dismissal of adversary proceeding), at 9 (*"Petitioners' District Court Reply Brief"*).

- "And while the Second Circuit [in *Whelton*] concededly did apply the 'reasonable time' limitation codified at Fed. R. Civ. P. 60(b)(4), it did so based upon the fact that ECMC sought to declare a confirmed plan provision void *ab initio*. [Petitioners,] *by contrast, solely seek* to declare the Release and Injunction unenforceable against those parties that did not receive constitutionally sufficient notice of these provisions." *Id.* at 15 (emphasis added).

- "[Petitioners] properly proceeded by way of adversary proceeding and were in no way required to comply with the provisions of . . . Fed. R. Civ. P. 60(b)." *Id.* at 16.

- "The relief being requested by [Petitioners] is far less drastic than that sought in *Whelton*. [Petitioners] *do not seek a declaration that a plan provision is void ab initio.*" App. at 31a-32a (Petitioners'

Second Circuit Brief at 22) (emphasis added).

- "Nor have [Petitioners] sought to attack the Confirmation Order generally as to all parties—only its applicability to parties that did not receive constitutionally sufficient notice." App. at 67a-68a (Petitioners' Second Circuit Reply at 10).

Correspondingly, the Court of Appeals did not understand Petitioners to have sought relief under Rule 60(b)(4). *See* Pet. App. at 4a. Thus, in part because Petitioners did *not* assert voidness, the Court of Appeals *rejected* Petitioners' attempt to rely by analogy on *Whelton v. Educational Credit Management Corp.*, 432 F.3d 150 (2d Cir. 2005), which found that Rule 60(b)'s requirement that a motion be brought within a "reasonable time" was flexible when the motion was a request "to declare one of the provisions of a confirmed plan void." *See* Pet. App. at 4a (quoting *Whelton*, 432 F.3d at 156 n.2). Similarly, Respondents did not understand Petitioners to have relied on Rule 60(b)(4). *See* App. at 88a (Respondents' Second Circuit Brief at 14) ("[T]he fact [Petitioners] sought relief under a Rule 60(b) subsection *other than Rule 60(b)(4)* does not alter the conclusion Rule 60(b) controls.") (emphasis added).

B. Petitioners' Argument Below Was Limited To The Impact Of Allegedly Insufficient Notice

What Petitioners did argue below was that Rule 60(b) did *not* apply to Petitioners' Complaint and, therefore, Petitioners could rely exclusively on the Declaratory Judgment Act to

obtain limited relief from the Release without addressing Rule 60(b)'s requirements.[8] *See* A-829-31; App. at 61a-62a. Moreover, in all the motion practice and related appeals below, Petitioners argued the declaratory relief sought was merely that the Release was not enforceable against them, not that the Confirmation Order or Release was void. *See* Argument I.A. Thus, in the Bankruptcy Court and District Court, Petitioners never relied on Rule 60(b)(4) to defeat Respondents' motion to dismiss the Complaint.[9]

Even in the Court of Appeals, Petitioners' principal brief *never* mentioned Rule 60(b)(4) and only mentioned Rule 60(b)(5) and (6) in connection with Petitioners' Motion to Modify the Plan, *not* concerning dismissal of Petitioners' Complaint. *See* App. at 10a. Indeed, Petitioners did not even mention Rule 60(b)(4) or a voidness argument until their Court of Appeals Reply. Even then, however, Petitioners qualified their argument by stating Petitioners "have not taken the position that the Release and Injunction is void on its face or as to all creditors. Rather, they

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[8] Petitioners did rely on Rule 60(b)(5) or (6) for their Plan Modification Motion, which sought temporary relief solely so Petitioners could file a placeholder complaint in the Illinois Litigation. A-736-37 (¶21). Even then, however, Petitioners relied on subsections of Rule 60(b) *other than* Rule 60(b)(4) and as to which Petitioners conceded the "reasonable time" requirement applied. *See id.*

[9] In the District Court, Petitioners' principal brief in the appeal of dismissal of Petitioners' Complaint never mentions Rule 60(b) and Petitioners' Reply mentions Rule 60(b)(4) only in the context of summarizing certain cases, not as the basis for Petitioners' appeal. *See* Petitioners' District Court Brief; Petitioners' District Court Reply Brief.

have asserted that these provisions are unenforceable against the parties that did not receive constitutionally sufficient notice." App. at 64a. Further, in their Reply, Petititioners did not argue they were not subject to the reasonable time limitation of Rule 60(b), but merely contended they had acted *within* a reasonable period because Rule 60(b)(4) was "lenient":

> the [Petitioners'] request was timely made in the context of Rule 60(b)(4). The one year limit of Rule 60 does not apply to a voidness challenge challenge under Rule 60(b)(4). *Rather the relief sought must be made only within a reasonable time.* . . . A period of a few extended months is not an extended period of time which should obviate relief under Rule 60(b).

Id. at 65a-66a (citations omitted) (emphasis added).[10] Consequently, Petitioners' arguments below provide no basis for granting certiorari.

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[10] Correspondingly, Petitioners stated that "[a] review of a denial of a Rule 60(b) motion is subject to an abuse of discretion standard." App. at 40a (citation omitted). Notably, Petitioners' statement is not limited to Rule 60(b)(5) and (6). Regardless, at a minimum, Petitioners acknowledge a court has discretion to fashion the appropriate remedy when applying Rule 60(b)(4). *See, e.g.*, Petition at 15 n. 7, 18.

II. CERTIORARI IS UNWARRANTED HERE BECAUSE THE ISSUE PETITIONERS PRESENT WAS NOT CONSIDERED BY THE SECOND CIRCUIT AND IS NOT THE SUBJECT OF A "CIRCUIT SPLIT."

A. Petitioners Mischaracterize The Ruling Below.

In an attempt to create an issue for this Court when none exists, *Petitioners assert* the Second Circuit: (a) held "the reasonable time limitation applies to voidness challenges," Petition at 13; and (b) affirmed the District Court's decision "based upon the conclusions that a bankruptcy court has discretion under Rule 60(b) of the Federal Rules of Civil Procedure to deny relief to a creditor who does not seek relief from an allegedly void plan of reorganization within what the bankruptcy court believes to be a 'reasonable time.' " Petition at 3-4.

The circuit court held no such thing; rather, it found the Bankruptcy Court had not abused its discretion when rejecting Petitioners' request for a declaratory judgment on two grounds. First, the circuit court found the Bankruptcy Court had discretion to determine the propriety of hearing a declaratory judgment request, and that discretion included considerations of timeliness. Pet. App. at 3a-4a. Second, the circuit court found the Bankruptcy Court had discretion to dismiss Petitioners' request for declaratory judgment as untimely under Rule 60(b) "as discussed above." What the circuit court had "discussed above" was Petitioners' argument that the Release was not enforceable as to Petitioners

because they allegedly had not received proper notice. *Id.* at 3a. The circuit court found Petitioners' request was likely governed by Rule 60(b)(3), and acknowledged that "Appellants allege" the Complaint properly was governed by Rule 60(b)(5) "and/or" (6). *Id.* The circuit court, therefore, was ruling on the basis of either the Rule 60(b) subsection the circuit court thought governed the request, *i.e.*, 60(b)(3), or the subsections Petitioners alleged applied, *i.e.*, Rule 60(b)(5) or (6). *None* of these subsections was Rule 60(b)(4). Indeed, the circuit court's Opinion makes no reference to Rule 60(b)(4) and never discusses voidness.

Not surprisingly, therefore, Petitioners' phrasing of the issue presented here seeks to circumvent the fact the court below simply did not rule on it. Specifically, Petitioners oddly frame the issue presented as whether "an otherwise unenforceable order [may] become enforceable against parties whose rights the order purports to extinguish because those parties did not affirmatively move to enforce their rights within the 'reasonable time' contemplated by Federal Rule of Civil Procedure 60(b)." Petition at 4. Notably, this convoluted recitation of the question presented fails to use the word "void" or refer to Rule 60(b)(4).[11] Yet, the actual issue, were it in fact presented in this appeal, would have been whether an allegedly void order may be challenged under Rule 60(b)(4) in perpetuity. Since, contrary to

[11] Further, as framed, the question *presumes* Petitioners failed to act within the "reasonable time" prerequisite of Rule 60(b). Moreover, Petitioners ignore that a court order is not unenforceable unless a court first has found the order is unenforceable. *See* n. 14 *infra*.

Petitioners' repeated assertions, the Second Circuit neither considered nor ruled on whether a motion to vacate under Rule 60(b)(4) must be made within a reasonable time or whether a reasonable time limit applies to voidness challenges, no basis for certiorari exists here.

B. Petitioners Mischaracterize The Rulings Of The Second Circuit And Other Circuit Courts Regarding Rule 60(b)(4) To Manufacture A Nonexistent "Circuit Split."

Petitioners describe the so-called "majority" of circuit courts as permitting a Rule 60(b)(4) motion to be made at any time: "notwithstanding the 'reasonable time' limitation of Rule 60(b), at least seven circuits have held that a Rule 60(b)(4) motion to set aside a void judgment may be brought 'at any time.'" Petition at 21. Contrary to Petitioners' assertion, however, current Second Circuit law is consistent with this "majority" view.

Petitioners assert the Second Circuit has "repeatedly made clear that district courts retain discretion to deny requests for relief they determine were not made within a reasonable time," relying on cases such as *Central Vermont Public Service Corp. v. Herbert*, 341 F.3d 186 (2d Cir. 2003). Petition at 19. Yet, *Central Vermont* imposed no time limit regarding a voidness challenge. In *Central Vermont*, the Second Circuit reversed the District Court's decision that movants' Rule 60(b)(4) motion challenging a bankruptcy court injunction was untimely. The Second Circuit held the motion was timely,

although brought more than four years after the movant learned of the challenged injunction, reasoning as follows:

> Even though Rule 60(b) states that '[t]he motion must be made in a reasonable time,' courts have been exceedingly lenient in defining the term 'reasonable time,' with regard to voidness challenges. In fact, it has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void 'may be made at any time.' "

341 F.3d at 189 (citation omitted). The other Second Circuit cases cited by Petitioners follow a similar approach. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 190-91 (2d Cir. 2006) (Rule 60(b)(4) motion made more than five years after the judgment was entered was timely "whether or not they theoretically had the option" of bringing the motion earlier); *Whelton*, 432 F.3d at 156 n.2 ("reasonable time" limitation of Rule 60(4)(b) has been interpreted permissively, and for all intents and purposes, may be made at any time).[12] Thus, the Second Circuit decisions cited by Petitioners do not conflict with the standard Petitioners assert is applied in the

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[12] The only Second Circuit cases actually finding Rule 60(b)(4) motions to be untimely involved circumstances akin to waiver. In effect, when a party previously made a Rule 60(b) motion without raising Rule 60(b)(4) and then more than a year later made another Rule 60(b) motion raising Rule 60(b)(4) for the first time, the Rule 60(b)(4) motion may be denied as untimely. *See State Street Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004); *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997).

"majority" circuits. *See* cases cited in Petition at 16-17.[13]

In a further misguided attempt to distinguish Second Circuit precedent, Petitioners concoct three "rules" of the "majority of courts" for application of Rule 60(b)(4). *See* Petition at 17-18. Petitioners offer no citations to support their assertion that all three such "rules" are the law in a majority of circuits. Further, Petitioners fail to acknowledge that established law in the Second Circuit is compatible with such "rules" to

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[13] Petitioners also assert that the First and Eighth Circuits take a "minority" view and require that Rule 60(b)(4) motions be filed within a reasonable time. The cases relied on by Petitioners offer no meaningful support for this argument. *See Baldwin v. Credit Based Asset Servicing & Securitization*, 516 F.3d 734, 737 (8th Cir. 2008) (finding that motion was timely under Rule 60(b)(4) as opposed to under bankruptcy provision requiring motion to be made within 10 days of judgment; mention of "reasonable time" dictum); *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003) (stating "[s]ince a void judgment is a legal nullity, there is ordinarily no need to request relief from it (and, thus, no time limit within which to request relief)" and emphasizing litigants were engaged in a "course of conduct designed to evade legal responsibility"). As to the only circuit possibly utilizing the so-called "minority" view, the Sixth Circuit, petitioners can only cite to *unpublished* decisions containing little analysis. *See Blachy v. Butcher*, No. 03-2079, 2005 WL 843905, at *5 (6th Cir. Apr. 12, 2005) (unpublished decision ruling that a motion citing a mélange of grounds made under Rule 60(b)(4), (5), and (6) was untimely after three years); *Manohar v. Massillon Community Hosp.*, No. 99-3481, 2000 WL 302776, at *1 (6th Cir. Mar. 17, 2000) (unpublished decision affirming denial of Rule 60(b)(4) motion as untimely after five years); *Richard v. Allen*, No. 95-3451, 1996 WL 102419, at *1 (6th Cir. Mar. 7, 1996) (unpublished decision affirming denial of Rule 60(b)(4) motion as untimely after almost four years).

the extent relevant here. Indeed, Petitioners incorrectly imply Second Circuit law is not compatible.

The first of Petitioners' three "rules," that the reasonable time requirement does not apply to Rule 60(b) motions alleging a judgment is void, is simply a rehash of the so-called "majority" view of circuit courts. As demonstrated above, this "rule" is consistent with the Second Circuit's approach that "for all intents and purposes, a motion to vacate a default judgment as void may be made at any time." *See, e.g., Central Vermont*, 341 F.3d at 189 (citations and internal quotations omitted).

Petitioners' second "rule," that courts have no discretion in granting relief from a void judgment under Rule 60(b)(4), is either redundant to the first "rule" or misleading, as Petitioners concede courts have discretion in fashioning a remedy under Rule 60(b)(4), particularly in the bankruptcy context. *See, e.g.*, Petition at 15 n.7, 18. Argument III. D. below amplifies on a court's flexibility in granting any such remedy.

Petitioners' third "rule" is that a Rule 60(b) motion is not the only avenue to prevent enforcement of void judgments. The only support Petitioners offer for this vague proposition is a scattershot collection of four cases, only one of which is at the appellate level, and none of which even addresses whether the parties raised Rule 60(b), let alone its application. *See In re Unioil*, 948 F.2d 678, 683-84 (10th Cir. 1991) (without discussion of Rule 60(b), finding creditor that did not receive notice was not bound by reorganization plan); *In re Spring Valley Farms, Inc.*, 68

B.R. 756, 759-61 (Bankr. N.D. Ala. 1986), *aff'd*, 85 B.R. 593 (N.D. Ala. 1988), *aff'd*, 863 F.2d 832 (4th Cir. 1989) (without discussion of Rule 60(b), finding plaintiffs seeking to add debtor as a defendant to existing nuisance action were not barred by confirmed plan because plaintiffs did not receive notices required by Bankruptcy Rule 2002); *In re Chance Industries, Inc.*, 367 B.R. 689, 707-10 (Bankr. D. Kan. 2006) (without discussion of Rule 60(b), finding claim of personal injury plaintiff injured after plan was confirmed did not come within category of barred claims); *In re Newstar Energy of Texas, LLC*, 280 B.R. 623, 626-27 (Bankr. W.D. Mich. 2002) (without discussion of Rule 60(b), finding creditor that did not receive notice of plan of reorganization was not bound by plan). These cases spanning twenty years and disparate jurisdictions hardly constitute even a pattern, much less a "rule." Further, there is substantial case law to the contrary.[14]

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[14] *See In re Hudson*, 260 B.R. 421, 443 (Bankr. W.D. Mich. 2001) ("Some reported opinions seem to declare that a chapter 13 plan that is confirmed without proper notice is ineffective. . . . Even assuming a confirmation order is defective, whether because of defective notice or any other reason, it remains binding until procedures are utilized to successfully revoke or obtain relief from the order. *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134 (1938) (even assuming jurisdiction is nonexistent, a court order remains binding unless subsequently set aside).") (applying Rule 60(b)); *In re Swanson*, 312 B.R. 153, 157-58 (Bankr. N.D. Ill. 2004) (Rule 60(b) must be utilized to obtain relief from a confirmation order based on inadequate notice); *In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 543 (Bankr. M.D. Tenn. 1983) ("Once a confirmation order becomes final, the only remedy available is to have the order set aside pursuant to Rule 60 of the *Federal Rules of Civil Procedure*.") (footnotes omitted).

Finally, nothing in Second Circuit cases directly conflicts with the four decisions Petitioners cite.

Hence, Petitioners mischaracterize Second Circuit and other circuit caselaw in an attempt to manufacture a non-existent "split" between the Second Circuit and the so-called "majority" view to create the impression there is an issue for this Court to address. Yet, not only did the ruling below not impact existing Second Circuit law applicable to Rule 60(b)(4) and voidness challenges, but there is no conflict between Second Circuit law and the "majority" view described by Petitioners. Petitioners fail to provide any basis for granting certiorari.

III. GRANTING THE WRIT PETITIONERS REQUEST WOULD SERVE NO PRACTICAL PURPOSE BECAUSE THERE ARE MULTIPLE INDEPENDENT BASES FOR DISMISSAL OF PETITIONERS' LAWSUIT.

Even where a clear conflict exists among circuits, certiorari may be denied if resolution of the conflict would not impact the ultimate outcome of the case. *See* Gressman, Geller, et al., *Supreme Court Practice* (9th ed. 2007) at 248 (citing *Sommerville v. U.S.*, 376 U.S. 909 (1964) (despite conflict as to whether Federal or state law applied, certiorari was denied because petitioner would be liable under either alternative)). Accordingly, even if Petitioners had asserted below a Rule 60(b)(4) argument based on voidness (which Petitioners did not), and if the Second Circuit had rendered a decision based on that argument (which the circuit court did not), and if there were a split among the circuits on that issue

(which there is not), certiorari still would be inappropriate here because resolution of the conflict alleged by Petitioners would not alter the ultimate outcome of their litigation against Respondents.[15]

A. Petitioners No Longer May Seek A Remedy Based On An Allegedly Void Order.

Petitioners' failure to raise Rule 60(b)(4) below until their Second Circuit Reply (and even then only in a qualified fashion) signifies that Petitioners failed to act within a reasonable time and waived any ability to rely on Rule 60(b)(4). *See Beller & Keller*, 120 F.3d at 24 (movant's failure to raise Rule 60(b)(4) voidness argument in first motion to vacate signified movant "could reasonably be held to have waived his right to raise the argument); *Planet Corp. v. Sullivan*, 702 F.2d 123, 125 (7th Cir. 1983) (second motion to vacate filed one year after judgment was entered and raising, *inter alia*, new voidness argument, was not filed within a "reasonable time"). Indeed, in *Page v. Schweiker*, 786 F.2d 150 (3d Cir. 1986), the fact the appellant first raised a Rule 60(b)(4) argument in the circuit court after making only a Rule 60(b)(1) challenge of an allegedly void order in the district court was fatal:

> [appellant] appeals from the order denying her Rule 60(b) motion, not from the judgment that she now contends is void. There is no

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[15] A primary reason Petitioners could not succeed is that their underlying claims against Respondents are meritless. Nevertheless, this is not the forum to address that lack of merit.

> doubt as to the district court's power to issue the order now before us, though—of course—that order may be erroneous. An order is not void because it is erroneous.

Id. at 153 (citation omitted). Accordingly, Petitioners may not rely on Rule 60(b)(4) now.

B. Petitioners Were Unknown Creditors Of The Debtors And Received The Required Publication Notice.

Petitioners argue the Release and Injunction are not enforceable against Petitioners because they were known creditors of the Debtors entitled to, but who did not receive, actual notice of confirmation of the Plan. Petitioners concede the publication notice they received was sufficient for unknown creditors. Hence, an essential element for Petitioners' ultimate success is establishing they were *known* creditors.

Yet the Bankruptcy Court and District Court each found that Petitioners' Complaint failed to state a claim that they were known creditors and dismissed the Complaint (and affirmed that dismissal) on that basis. *See* Pet. App. at 23a-24a; 8a-9a. Further, the Second Circuit affirmed the District Court's judgment and Petitioners seek no review here of any determination they were not known creditors of the Debtors. *See id.* at 5a. Consequently, Petitioners cannot establish that they were known creditors of the Debtors and, therefore, no purpose would be served by granting Petitioners' petition for certiorari.

C. Petitioners Are No Longer Entitled To Pursue Their Copyright Claims Because The Statutes Of Limitation On Their Claims Have Run.

Petitioners concede the statutes of limitation applicable to their claims likely have run. *See* Petition at 10 n. 4; A-730 (Plan Modification Motion (which was filed almost one year ago by Petitioners on the basis of allegedly imminent expiration of applicable statutes of limitation)). Certainly, there is no basis for Petitioners' unsupported assertion that their unsuccessful Plan Modification Motion somehow "equitably tolls any statutes of limitation that may be applicable to their claims against" Respondents. *See* Petition at 10 n. 4. Petitioners substantially delayed in initially seeking relief, and never made a meaningful effort to expedite resolution of Petitioners' Complaint. Moreover, they failed to make a coherent argument in the Bankruptcy Court regarding potential expiration of applicable statutes of limitation. *See* Pet. App. at 13a. Thus, there is no reason for this Court to entertain Petitioners' certiorari petition, as it is a futile endeavor.

D. Any Success Under Rule 60(b)(4) Would Not Entitle Petitioners To A Remedy Against Respondents.

As demonstrated by the cases relied upon by Petitioners, even if Petitioners overcame all the hurdles referenced above, Petitioners' entitlement to a remedy and the nature of any remedy would be determined by the Bankruptcy Court

based on the circumstances.[16] *See, e.g., City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293, 296 (1953) ("We hold that publication of the bar order in newspapers cannot be considered 'reasonable notice' to New York *under the circumstances of this case.*") (emphasis added); *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("*Under the circumstances presented in this case,*", i.e., after the debtor "had already fully distributed the payable assets" to the class of claims in which the unnoticed creditor's claim belonged, the creditor's claim may be pursued against the debtor as if no discharge had occurred.) (emphasis added); *United States v. One Toshiba Color Television*, 213 F.3d 147, 158-59 (3d Cir. 2000) ("[O]ur holding is not to be construed as allowing a petitioner to sit on his or her rights. It is true that if a court is able to determine that a prior judgment is indeed void, it should declare it as such, but that does not mean that other remedies, such as the actual return of property or its cash value, are immune from defense of waiver or laches. . . . *It is in the pursuit of his remedies that [movant's] delay, if any will become an issue.*") (emphasis added); *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1451 (9th Cir. 1985) ("Our holding

[16] Petitioners themselves acknowledge that in a "mega-case" such as this, the Bankruptcy Court would have significant discretion in fashioning any relief that might be warranted: "the appropriate remedy for due process violations affecting creditors whose claims are small in the context of the plan as a whole will often be to hold that the claims of the improperly notified creditors are not discharged or subject to the plan, rather than revoking or vacating the plan as a whole." Petition at 15 n. 7.

that the [cash collateral order] is void to the extent it [abridged the rights of a secured creditor who did not receive notice] does not, therefore, require that [the secured creditor] be placed in the precise position it would have occupied had [the order not been approved]." Instead, the court only granted the secured creditor limited relief to "protect its interest *without disturbing the myriad of transactions that occurred in reliance on the [cash collateral order]*.").[17]

Here, as the Bankruptcy Court made clear, all such circumstances militate strongly against any court granting Petitioners the relief they seek, the right to pursue Respondents unfettered by the Release. First, in reliance on the Release, over $260 million of consideration was provided to the Debtors on Respondents' behalf that enabled the Debtors' creditors to be paid nearly

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[17] *See In re Columbia Ribbon & Carbon Mfg. Co.*, 54 B.R. 714, 721 (Bankr. S.D.N.Y. 1985) ("No-notice creditors may file a claim entitled to *pari passu* distribution status at anytime *before the final distribution is made.*") (emphasis added); *In re C.S.T. Construction Co.*, 21 B.R. 840, 844 (Bankr. N.D. Ill. 1982) ("Circumstances such as an already confirmed Plan, a partially or wholly effectuated Plan, or delay on the part of the creditor in requesting leave to file a Proof of Claim may militate in favor of the conclusion that justice does not require nor allow the late filing of a claim [by a known creditor who did not receive actual notice]. The Supreme Court's decision in *City of New York v. New York, N.H. & H. Railroad* does not provide direction for such cases."); *In re Rideout*, 86 B.R. 523, 530 (Bankr. N.D. Ohio 1988) (court evaluates alternative remedies for inadequate notice of plan confirmation, applies Rule 60(b), and states that a critical factor "*setting this case apart, is the fact that [the creditors] brought this matter before the Court promptly*, thereby minimizing the Creditors' reliance on the Confirmed Plan.") (emphasis added).

(or totally) in full. Second, it is the Debtors, not Respondents, who are the primary alleged wrongdoers here as it was *the Debtors* who allegedly did not provide requisite notice to Petitioners and *the Debtors* who allegedly improperly provided Petitioners' photographs to Respondents. Indeed, the bankruptcy cases addressing inadequate notice focus on whether the creditor may pursue *the debtor* (who was responsible for giving notice), either by filing a late claim or by pursuing an undischarged claim or lien, not by pursuing a third party beneficiary of a release. Third, while throughout this litigation Petitioners could have sought to file late claims against the Debtors and, if such claims were meritorious, recover nearly (or totally) in full, Petitioners never sought such relief. Moreover, Petitioners also never sought to facilitate that relief by seeking to stay the Debtors' distributions to creditors or to accelerate the resolution of their Complaint in the Bankruptcy Court. Fourth, Petitioners unreasonably delayed in seeking relief for at least seven months (and perhaps much longer) after receiving actual notice of the Release.

In light of these and other circumstances favoring Respondents, it is inconceivable the Bankruptcy Court ever would have granted relief permitting Petitioners to pursue Respondents, as the District Court noted. *See* Pet. App. at 9a n. 3. In fact, the Bankruptcy Court was cognizant of Petitioners' delay in filing and failure to seek expedited resolution of Petitioners' Complaint. Pet. App. at 17a n. 4, 19a-20a. *See Cotto v. U.S.*, 993 F.2d 274, 280 (1st Cir. 1993) ("[T]here is no valid excuse for having dawdled . . . . Such protracted delay scuttles any claim that plaintiffs'

motion was 'made within a reasonable time.' ") (citation omitted). Even when laches has been held to be unavailable to preclude a claimant from challenging a void judgment, courts emphasize that "our holding is not to be construed as allowing a petitioner to sit on his or her rights," and hold that, although the prior judgment was void, substantive remedies, such as the return of property or money, still would be subject to defenses of waiver or laches. *One Toshiba Color Television*, 213 F.3d at 158. Accordingly, in this action, even in the unlikely event the Release and Injunction ever were declared void, Petitioners would have lost any right to pursue claims against Respondents by reason of waiver and laches as well as the other grounds demonstrated above.

That conclusion is buttressed by the critical importance of finality in bankruptcy cases.[18] Petitioners largely ignore the context of this case, in which Rule 60(b) is made applicable by Bankruptcy Rule 9024. Instead, Petitioners mix bankruptcy cases and non-bankruptcy cases willy-nilly throughout their Petition. Yet, in bankruptcy cases, thousands of parties surrender rights, invest money, and otherwise change their positions in reliance on an order confirming a reorganization plan. In pursuit of their claims,

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[18] Petitioners argue the bankruptcy aspect of this case somehow signifies notice is uniquely important. Yet, notice is always important. What distinguishes bankruptcy cases is the multiple parties involved who act upon a bankruptcy court's confirmation order, rather than a traditional "A vs. B" litigation. Thus, of paramount importance are finality and limitations on remedies that would thwart a reorganization plan already relied on by numerous parties.

Petitioners propose to disrupt a confirmed and largely consummated Plan, after having failed to seek available remedies against the Debtors that could have addressed Petitioners' concerns (if they had valid claims) without prejudicing the many other parties affected by and who acted in reliance on the Plan.[19]

Accordingly, in the bankruptcy context, any potential loss to Petitioners must be weighed against the strong policy considerations favoring finality of confirmation orders, particularly when over $260 million of consideration "vital" to the Debtors' Plan has changed hands irrevocably.[20]

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[19] Ignoring such massive prejudice to others, Petitioners inappropriately argue "[t]he unfairness of the lack of notice in this case is further compounded by the fact that the Release and Injunction purported to extinguish Petitioners' claims against *non-debtors*." Petition at 24 n. 10 (citing *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005)). First, publication notice was given. Second, once Petitioners had actual notice of the Release, Petitioners delayed at least seven months before filing their Complaint and failed to file claims against the Debtors, although Petitioners acknowledge it was the Debtors who were responsible for providing notice and alleged the Debtors provided Petitioners' photographs to Respondents without authorization. Third, over $260 million of consideration was paid on behalf of Respondents to the Debtors to help pay their creditors in full (which could have included Petitioners if they had valid claims). Indeed, those facts, among others, more than justified the non-debtor Release and Injunction under the standard set forth in *Metromedia*.

[20] *See In re 401 E. 89th St. Owners, Inc.*, 223 B.R. 75, 79 (Bankr. S.D.N.Y. 1998); *In re Astroglass*, 32 B.R 538, 544 (Bankr. M.D. Tenn. 1983) ("Rule 60 relief is inappropriate when circumstances have so changed that prejudice will result.") (citations omitted); *In re Rideout*, 86 B.R. at 530 (court evaluates alternative remedies for inadequate notice

A-145 (¶ 52); Pet. App. at 15a n. 1. That policy favoring finality in bankruptcy matters is exemplified by section 1144, which precludes an attempt to revoke a confirmation order, even one obtained by fraud, once 180 days have passed. 11 U.S.C. § 1144. Similarly, as noted by the Bankruptcy Court, "Bankruptcy Rule 8002 underscores the importance of finality of a court's order approving a disclosure [statement] or plan of reorganization."[21] Pet. App. at 23a-24a.

Also, when applying Rule 60(b) in bankruptcy cases, "the inclusion of [§ 1141(a)] in the Bankruptcy Code as well as the narrow grounds established under 11 U.S.C. § 1144 for revocation of an order of confirmation supports a *strong presumption in favor of finality*."[22] *In re Poteet Construction Co.*, 122 B.R. 616, 619 (Bankr. S.D. Ga. 1990) (emphasis added). Under Rule 60(b), therefore, Petitioners' "burden of proof requirement extends not only to demonstrate [a] factual basis to support relief but also that harm to movant outweighs [the] necessity for finality in orders of plan confirmation." *Id.*

Thus, as Petitioners have not demonstrated and cannot demonstrate they would be entitled to

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of plan confirmation, applies Rule 60(b), and states that a critical factor "*setting this case apart, is the fact that [the creditors] brought this matter before the Court promptly*, thereby minimizing the Creditors' reliance on the Confirmed Plan") (emphasis added).

[21] Bankruptcy Rule 8002(c)(1)(E) and (F) precludes granting any extension of time to appeal from an order approving a disclosure statement or confirming a plan.

[22] Section 1141(a) provides, *inter alia*, that "the provisions of a confirmed plan bind . . . any creditor [of the debtor] . . . . 11 U.S.C. § 1141(a).

pursue relief against Respondents, Petitioners' request for a writ should be denied.

CONCLUSION

For all of the reasons set forth herein, Respondents respectfully request that the Court decline to grant a writ of certiorari in this matter. Petitioners' asserted basis for granting certiorari was never properly presented to (or decided by) the courts below and, in fact, was expressly disavowed by Petitioners, no genuine conflict exists among the Circuits, and there are several independent bases for dismissal of Petitioners' suit. The courts below reached the correct result, and there are no compelling reasons why the writ should be granted.

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07-1310-bk(L)

07-1319-bk(CON), 07-1325-bk(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SPIEGEL, INC., ET AL.,

Debtors.

BICO STUPAKOFF AND RUSSELL JAMES,

Appellants,

—against—

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., and OTTO SUMISHO INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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PRELIMINARY STATEMENT

Appellants Bico Stupakoff and Russell James (collectively, the "Appellants" or "Photographers") have taken this appeal from a decision by United States District Judge Naomi Reice Buchwald in consolidated appeals of three decisions by United States Bankruptcy Judge Burton Lifland. Judge Lifland (i) dismissed an adversary proceeding filed by the Photographers against Appellees Otto (GmbH & Co KG), Otto Doosan Ltd. and Otto Sumisho Inc. (collectively, the "Appellees" or the "Otto Entities"), seeking a declaration that the release and injunction contained in the confirmed plan of Spiegel, Inc. could not be enforced against the Photographers, (ii) entered an order on another party's motion containing language broad enough to deem the Photographers' claims against the Otto Entities to be barred by the plan release and injunction and (iii) declined to modify the Spiegel plan release and injunction to permit the Photographers to file their class action complaint against the Otto Entities, pending adjudication of the validity of the release and injunction. Judge Buchwald affirmed Judge Lifland's decisions in their entirety. *See Stupakoff v. Otto (GmbH & Co KG),* no. 06 Civ. 09385(NRB); no. 06 Civ. 13584 (NRB), no. 06 Civ. 13585, 2007 WL 656902 (S.D.N.Y. Feb. 28, 2007) (slip opinion)(available on Westlaw).

JURISDICTIONAL STATEMENT

The United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court") had jurisdiction over the issues raised in this appeal pursuant to 28 U.S.C. § 1334. All of these issues arose in or are related to the Chapter 11 proceeding of Spiegel, Inc., pending as Case No. 03-11540 in the Bankruptcy Court. The issues raised before the Bankruptcy Court were: (i) whether the plan release and injunction were enforceable against the Photographers given the failure to provide them advance actual notice of such relief, (ii) whether the plan release and injunction should be declared enforceable against the Photographers on another party's motion, without affording the Photographers a hearing on their due process arguments and (iii) whether the plan injunction should be modified to permit the Photographers to file their class action complaint pending adjudication of the validity of the release and injunction.

The Bankruptcy Court ruled on the foregoing issues through its Findings of Fact, Conclusions of Law, and Order Denying Motion of Peter Rosenbaum Photography Corporation for a Declaratory Ruling Pursuant to Sections 105(a) and 1109 (b) of the Bankruptcy Code, Etc. and Denying Related Relief (the "Rosenbaum Order") and the Opinion and Order Denying Plaintiff's Request for an Order Modifying the Plan Injunction and Granting Defendants' Motion to Dismiss (the "Photographer Order"). *See* Appendix A-698 – A-726; A-1505 – A-1546. The Rosenbaum Order was entered on August 16, 2006. *See* Appendix A-

698 – A-726. The Photographers filed a timely notice of appeal from the Rosenbaum Order on August 25, 2006. The Photographer Order was entered on November 1, 2006. *See* Appendix A-1505 – A-1546. The Photographers filed a timely notice of appeal from the Photographer Order on November 10, 2006. Both the Rosenbaum Order and the Photographer Order were final orders of the Bankruptcy Court. The United States District Court for the Southern District of New York (the "District Court") had jurisdiction over these appeals pursuant to 28 U.S.C. § 158.

On February 28, 2007, the District Court issued its Memorandum Opinion and Order and Judgment Order affirming the Rosenbaum Order and the Photographer Order in their entirety. *See* Appendix A-1547 – A-1554. The Memorandum Opinion and Order and Judgment Order constitute a final judgment on the issues raised on appeal in the District Court, which disposes of all the Photographers' claims in their entirety. On March 29, 2007, the Photographers filed their timely notices of appeal from the Opinion and Order. *See* Appendix at A-1555 – A-1566. On May 14, 2007, this Court entered an order consolidating the three appeals taken from the Memorandum Opinion and Order and Judgment Order. This Court has jurisdiction over the consolidated appeals from the District Court pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the District Court erred in affirming the Bankruptcy Court's dismissal of an adversary proceeding seeking declaratory relief as to the enforceability of a plan release and injunction where the Plaintiff-Appellants pled that (i) they lacked actual notice of such injunction and release provisions, (ii) they were known creditors entitled to actual notice, and (iii) the lack of notice violated their constitutional rights to due process of law.

II. Whether the District Court erred in dismissing as moot the appeal of the Bankruptcy Court order declaring a non-debtor release contained in the confirmed plan of Spiegel, Inc. to be generally valid and enforceable where (i) the Appellants raised due process and notice objections to such release, (ii) Appellants filed a separate adversary proceeding to adjudicate these objections; and (iii) Appellants never received a hearing on these objections.

III. Whether the District Court erred in affirming the Bankruptcy Court's denial of a request to modify a plan injunction barring litigation against non-debtor parties where (i) the modification was sought for the limited purpose of filing a pleading to toll applicable statutes of limitation, (ii) no harm or prejudice would inure to the non-debtor parties as a result of such filing, and (iii) the validity and enforceability of the injunction is subject to dispute and challenge.

STATEMENT OF THE CASE

These consolidated appeals present the question of how far a bankruptcy court may go to impair the rights and claims held by absent parties against entities other than the Debtor. The confirmed plan of Spiegel, Inc. contained a broad release and injunction purporting to extinguish a wide variety of claims against entities other than Spiegel and its related debtors (the "Release and Injunction"). This type of "non-debtor release" represents the very outer limits of the Bankruptcy Court's power and jurisdiction, and is generally reserved for the most exceptional of circumstances. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-43 (2d Cir. 2005) ("While none of our cases explains when a non-debtor release is 'important' to a debtor's plan, it is clear that such release is proper only in rare cases."). The Appellee Otto Entities now contend that this Release and Injunction bars substantial copyright infringement and related claims asserted against them by the Photographers. However, the Photographers were never given actual notice of the proposed extinguishment of their claims prior to such relief being granted.

The Photographers filed an adversary proceeding seeking a declaration that the Release and Injunction were unenforceable against them, due to the failure to provide them constitutionally sufficient notice. *See* Appendix at A-545 – A-555. The Photographers also sought to continue a hearing on another party's motion addressing the enforceability of the Release and Injunction, or alternatively to obtain a finding

that the ruling on the other party's motion would not have preclusive effect against them. *See* Appendix A-516 – A-536. Finally, the Photographers sought to modify the injunction (without conceding its validity), so as to file their class action complaint pending adjudication of these issues. *See* Appendix A-727 – A-741.

The Bankruptcy Court ruled against them on all three issues. *See* Appendix A-698 – A-726; A-1505 – A-1546. Through entry of the Rosenbaum Order and Photographer Order, the Bankruptcy Court determined that the Release and Injunction were generally enforceable against the Photographers, dismissed their adversary proceeding, and declined to modify the injunction. The Photographers timely appealed from these rulings. The District Court affirmed in all respects. *See* Appendix A-1547 – A-1554. The Photographers then timely appealed to this Court.

STATEMENT OF FACTS

The Unauthorized Use and Distribution of the Photographs

The Photographers provided a limited license to Spiegel, Inc., one of the Debtors, for the use of certain of the Photographers' photographs in Spiegel's catalogue. *See* Appendix at A-518, A-547. The license did not permit Spiegel to transmit the photographs for use by other entities. *See Id.* at A-518. Notwithstanding the limited nature of this license, and in direct contravention of the license terms, Spiegel trans-

ferred the photographs for use by the Otto Entities. *See Id.* at A-518. The Otto Entities had neither a valid license nor permission to use these photographs. *See Id.* at A-518, A-547.

The Rosenbaum Litigation

On January 30, 2004, Peter Rosenbaum Photography Corporation ("Rosenbaum") brought suit (the "Illinois Complaint") against the Otto Entities in the United States District Court for the Northern District of Illinois (the "Illinois Court"). *See Id.* at A-548. The filing of the Illinois Complaint initiated the Illinois Litigation, which was assigned case no. 04-cv-00767. *See Id.* The Illinois Complaint sought damages from the Otto Entities for their unauthorized use of Rosenbaum's images. *See Id.*

During the summer of 2004, Otto Doosan and Otto Sumisho filed motions to dismiss the Illinois Complaint. *See Id.* at A-549. While the motions to dismiss were pending, the parties engaged in limited discovery related to the allegations contained in the motions to dismiss.

On October 20, 2005, Otto Doosan and Otto Sumisho filed their answers and affirmative defenses to the Illinois Complaint. *See Id.* at A-552. Neither answer asserted a defense based upon the claims pled having been released in the confirmed Debtors' Modified First Amended Joint Plan of Reorganization of Affiliated Debtors Pursuant to Chapter 11 of the Bankruptcy Code (the "Plan"). *See Id.* In early November of 2005, Rosenbaum sought leave of the Illinois Court to amend the Illinois Complaint. *See Id.* at A-553.

The proposed amendment alleged additional causes of action, and sought to have the Illinois Complaint certified as a class action. *See Id.* at A-518. A week after Rosenbaum sought leave to file his amended complaint, Otto Doosan and Otto Sumisho filed a notice of injunction. *See Id.* at A-553. On November 15, 2005, after receiving service of the Illinois Complaint, Otto (GmbH & Co KG) also filed a notice of injunction. This notice referenced the existence of the Release and Injunction contained in Spiegel's confirmed Plan, and asserted that the claims pled in the Illinois Complaint were subject to such Release and Injunction. *See Id.* at A-552. This was the first time that the Release and Injunction had been brought to the attention of the Illinois Court. *Id.* at A-553.

On April 10, 2006, Rosenbaum filed his Motion to Temporarily Lift the Stay of Proceedings for the Limited Purpose of Filing a Second Amended Class Action Complaint (the "Second Class Action Complaint") to be filed. Attached to the motion was the Second Class Action Complaint. Contrary to the findings of the Bankruptcy Court, this was the first complaint which referenced the Photographers by name. Before considering Rosenbaum's proposed amendment, the Illinois Court directed Rosenbaum to seek relief in the Bankruptcy Court as to the enforceability and applicability of the Release and Injunction. *See Id.* at A-553.

The Spiegel Bankruptcy Proceeding

On March 17, 2003, the Debtors filed petitions for relief under chapter 11 of Title 11, United States Code. *See Id.* at A-548. In March 2005, the Bankruptcy Court entered an order approving the Debtors' disclosure statement and setting a hearing on confirmation of the Plan. *See Id.* at A-550. The Plan contained the Release and Injunction which purport to release and enjoin all claims against the Otto Entities, non-debtors, that relate to Spiegel or its affiliated co-Debtors. *See Id.* at A-547, A-548, A-552. Despite their knowledge that the Otto Entities had used the Photographers' images without license or permission, neither the Otto Entities nor Spiegel advised the Photographers of the Release and Injunction, or of the other relief sought against them in Spiegel's Chapter 11 plan. *See Id.* at A-551, A552. This failure of notice occurred, notwithstanding (i) Spiegel's and the Otto Entities' knowledge of the Illinois Litigation and (ii) the contention by Spiegel and the Otto Entities that the Illinois Litigation is barred by the Release and Injunction. *See Id.* at A-550, A-551. The Court confirmed the Plan on May 25, 2005, and the Plan went effective on June 21, 2005. *See Id.* at A-552.

The Adversary Complaint

The Adversary Complaint seeks a declaration that the Release and Injunction are unenforceable against the Photographers because entry of these provisions violated the Photographers' constitutional rights to due process of law. *See gen-*

erally Id. at A-545- A-555. The Photographers allege in their Adversary Complaint that they were known creditors of both Spiegel and the Otto Entities, and thereby entitled to actual notice of the relief sought against them in the Plan, including the Release and Injunction. *See Id.* at A-546. Consistent with Rule 7001 of the Federal Rules of Bankruptcy Procedure, the Photographers sought their requested declaratory relief by adversary proceeding. *Id.*

SUMMARY OF ARGUMENTS

I. The Bankruptcy Court and District Court failed to apply the correct legal standard in reviewing the Motion to Dismiss. Rather than reviewing the Adversary Complaint and construing all facts in favor of the Photographers, the Bankruptcy Court and the District Court made findings adverse to the Photographers. By making factual findings and determining that the Photographers could not prove facts to support their claims, the Bankruptcy Court and the District Court went beyond the face of the Adversary Complaint and failed to follow the law in deciding the Motion to Dismiss.

II. The Bankruptcy Court and the District Court deprived the Photographers of their due process rights by failing to continue the hearing on a third party's motion which might implicate the Photographers' rights. Alternatively, the Bankruptcy Court and the District Court failed to provide adequate protection to the Photographers to ensure that any ruling made in the con-

text of a third party's motion would not prejudice the Photographers.

III. The Bankruptcy Court and the District Court improperly refused to modify the Release and Injunction to allow the Photographers to bring suit to prevent potential expiration of a statute of limitations while the foregoing issues are adjudicated. In so doing, the Bankruptcy Court and the District Court failed to provide the Photographers with a hearing on the merits of their motion, instead determining that the motion was untimely and that the Photographers failed to set forth substantive facts which would allow the relief sought. Instead of allowing the Photographers to amend or supplement their motion, the Bankruptcy Court denied it outright.

ARGUMENT

The issues in this case center on the intersection of third party releases and publication notice in bankruptcy cases. Separately, each tests the limits of a Bankruptcy Court's jurisdiction and authority. Combined, they have a synergistic effect which may exceed the Bankruptcy Court's power and authority. This case is such a case. By failing to provide **any** notice to the Photographers that their claims would be extinguished, the Otto Entities doomed their Release and Injunction to failure as against the Photographers.

I. THE BANKRUPTCY COURT IMPROPERLY DISMISSED THE PHOTOGRAPHERS' ADVERSARY COMPLAINT

A. Standard of Review

The District Court's affirming of the grant of a motion to dismiss is reviewed *de novo*. *See Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001).

B. The Bankruptcy Court and the District Court Misapplied the Applicable Standard of Review on a Motion to Dismiss

Both the District Court and the Bankruptcy Court applied an improper standard in reviewing the Adversary Complaint in response to the Motion to Dismiss. Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a plaintiff need only include " . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002). This pleading standard applies to all civil pleadings with only limited exceptions – none of which are applicable in this case. *See Swierkiewicz*, 534 U.S. at 513; *see also* Fed. R. Bankr. P. 7009. Further, the Supreme Court has determined that the heightened pleading standard of Rule 9 of the Federal Rules of Civil Procedure should not be extended to matters other than those set forth in Rule 9. *Swierkiewicz*, 534 U.S. at 513; *see also Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1972 n.14 (2007) (if

Rule 9 is to be extended, it must be by legislation). If a particular class of action is not encompassed by the plain language of Rule 9, the underlying cause of action need not be pled with particularity. *See Swierkiewicz*, 534 U.S. at 513.

The Federal Rules of Civil Procedure require that "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f); *see Swierkiewicz*, 534 U.S. at 514. If a complaint fails to provide sufficient notice of the claims, the correct procedural mechanism is a motion for more definite statement – not a motion to dismiss. *Swierkiewicz*, 534 U.S. at 514. All that is required is that the complaint give fair notice of the basis for the claims alleged. *Id.* "Indeed it may appear on the face of the pleadings that a recovery is very remote or unlikely but that is not the test." *Id. quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). It cannot be doubted that the Photographers' Adversary Complaint, taken as a whole, "renders their entitlement to relief plausible." *Bell Atlantic*, 127 S. Ct. at 1972 n.14. And, that is all that is required to defeat a motion to dismiss.

In reviewing whether a complaint evidences that the relief sought is plausible, a court must "accept all of plaintiff's factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff." *Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir. 2003). "[A] complaint need only meet the requirements of our 'simplified notice pleading standard [which] relies on liberal discovery rules and summary

judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.' " *Id. quoting Swierkiewicz*, 534 U.S. at 512; *see also Bell Atlantic*, 127 S. Ct. at 1964-65. The pleading standard requires a "reasonably founded hope that the [discovery] process will reveal relevant evidence to support the claim." *Bell Atlantic*, 127 S. Ct. at 1969 n.8 (citation omitted). Further, a complaint need not include detailed factual allegations, but must provide only the " 'grounds' of [plaintiff's] entitlement to relief' ". *Id.* at 1964-65. This must include "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Id.* at 1965.

In reviewing a motion to dismiss, a court may not consider matters outside the pleadings unless it converts the motion to one for summary judgment. *See Courtenay Communications*, 334 F.3d at 213. This "vigorous enforcement of the conversion requirement helps ensure that courts will refrain from engaging in fact-finding when considering a motion to dismiss . . ." *Id.* Contrary to this well established authority, the Bankruptcy Court and the District Court both looked past the face of the Adversary Complaint to determine that the Photographers would be unable to prove their causes of action. This was improper and mandates reversal. *Id.*

Under *Bell Atlantic*, which sets forth the Supreme Court's latest pronouncement on the pleading standard required to survive a motion

to dismiss[1], the Adversary Complaint is properly pled. *Bell Atlantic* requires only that the allegations taken as a whole support the cause of action pled. *Bell Atlantic*, 127 S. Ct. at 1973 n.14. It does not require that any specific factual allegations be made. *Id.* Nor does it require any heightened pleading standard. *Id.* ("In reaching this conclusion, we do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9 . . .").

C. The Photographers Have Properly Pled That They Were Entitled To Actual Notice

The Photographers have properly pled that they were entitled to, but did not receive, actual notice of the Release and Injunction. *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004) (a complaint only need meet the requirements of Fed. R. Civ. P. 8 with "a short and plain statement of the claims showing that the pleader is entitled to relief" and that the complaint gives the defendant notice of the plaintiff's claim and the grounds upon which it rests). In paragraph 24 of the Complaint, the Photographers pled that "[Photographers] were known creditors of the Debtors and parties to an agreement with the Debtors." *See* Appendix at A-549. In paragraphs 7 through 11 of the Adversary Complaint, the Photographers pled the events leading up to the improper Release and Injunction, including their

[1] It is unclear whether *Bell Atlantic* is limited only to antitrust cases or has larger applicability to general civil litigation.

contractual relationship with Spiegel and the lack of any contractual relationship with the Otto Entities – despite the latter's use of the Photographs. *See Id.* at A-547. Further, in paragraph 25 of the Complaint, the Photographers pled "Defendants knew or should have known that the Plan granted relief for their benefit, and against the [Photographers], and that the [Photographers] were therefore entitled to notice of such relief, including but not limited to notice of the Plan and Disclosure Statement (as defined below.)" *See Id.* at A-549. In paragraph 26, the Photographers pled that they "did not receive notice of the Plan and Disclosure Statement or of the Release contained therein." *Id.* These allegations, taken as a whole, meet the liberal pleading criteria imposed by Rule 8 and mandate that the Motion to Dismiss be denied. *Bell Atlantic*, 127 S. Ct. at 1973 n.14; *see also Swierkiewicz*, 534 U.S. at 514 (noting the allegations of termination based upon age, the events leading up to the termination, and those involved in the termination easily satisfy the requirements of fair notice).

Contrary to the mandate from this Court that pleadings be interpreted liberally with all inferences interpreted in favor of the plaintiff, the Bankruptcy Court (and the District Court in its summary affirmance)[2, 3] looked beyond the face of

[2] The Photographers will refer primarily to the Bankruptcy Court's opinion, given the brevity of the District Court's analysis, and its concurrence in the Bankruptcy Court's findings and rulings.

(*footnote 3 appears on next page*)

the Adversary Complaint to rationalize its wrongful dismissal. In so doing, the Bankruptcy Court ignored or discounted the well pled allegations that the Photographers were known creditors of the Debtors, and known to both the Debtors and the Otto Entities. *See* Appendix at A-549. These allegations, if taken as true, required that the Photographers be given actual notice of the Plan and Disclosure Statement and of the Release and Injunction contained therein. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ; *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983).

It has not been (and cannot be) disputed that the Photographers did not receive actual notice of the Plan or the Release and Injunction. Instead, the Otto Entities have argued that the Photographers were not known creditors and were therefore entitled only to notice by publication, which publication did occur. Apparently ignoring the well pled allegations of the Adversary Complaint, the Bankruptcy Court accepted this argu-

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[3] In its summary affirmance, the District Court inserted a footnote into its Memorandum and Order which stated: "[w]e need not review the bankruptcy court's holding that the Photographers' suit for a declaratory judgment is also barred by Federal Rule 60 . . ." *See* Appendix at A-1550. Despite that footnote, it continued to opine that any declaratory judgment action would also fail. In so doing, it adopted incorrect findings of the Bankruptcy Court and made an advisory opinion as to what the Bankruptcy Court would have done (and what it would have approved) if the Bankruptcy Court "had [] addressed that issue expressly." *Id.* Such advisory opinion is improper and should be given no import or effect.

ment. *See* Appendix at A-708 – A-709. The Bankruptcy Court stated "[t]hey were not, under all the facts that are not contested here, known creditors." *See Id.* at A-1458.

The Bankruptcy Court's ruling on this point appears to rely upon supposed facts which must be adduced after discovery and not in reviewing a motion to dismiss. *See Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999) ("[W]e note the District Court's unfortunate choice of words in its opinion, which might suggest that it did not apply the proper standard for a motion to dismiss under Rule 12 (b)(6)."). Quite simply, "[i]t is important to recognize the difference between disposing of a case on a 12(b)(6) motion and resolving the case later in the proceedings, for example by summary judgment." *Chance v. Armstrong*, 143 F.3d 698, 791 (2d Cir. 1998) ("At the 12(b)(6) stage, '[t]he issue is not whether a plaintiff is likely to prevail ultimately, but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely, but that is not the test.' "). "Specifically, the District Court's opinion appeared in several places to require [plaintiffs] to *prove* sufficient facts or to *produce* evidence to prove their claims . . . A plaintiff, of course, need only *allege*, not *prove*, sufficient facts to survive a motion to dismiss." *Koppel,* 167 F.3d at 133 (emphasis in original); *see also Courtenay Communications* 334 F.3d at 213. In the Adversary Complaint, the Photographers have "alleged facts that are not impossible to prove and that, if

demonstrated, would state a legally cognizable claim." *Chance*, 143 F.3d at 701.

The Otto Entities can be expected to argue that the adequacy of notice to the Photographers presents a question of law that need not be taken as true for purposes of a motion to dismiss. This argument, if made, conflicts with persuasive authority holding that lack of notice generally presents a question of fact that is inappropriate for resolution on a motion to dismiss. *See In re Pro Page Ptnrs, LLC*, No. 2:05-CV-166, 2006 U.S. Dist. Lexis 52250, at *19 (E.D. Tenn. July 28, 2006) (whether notice was adequate is a question of material fact); *In re Med. Tech., Inc.*, No. 05-47377-RFN-11, 2006 WL 2519530, at *6 (Bankr. N.D. Tex. June 26, 2006) (recognizing that determination of known versus unknown creditor must be determined on a case by case basis). The Supreme Court's decision in *Mullane* likewise acknowledges the case specific nature of notice inquiries. *See Mullane*, 339 U.S. at 314 . "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, *under all of the circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (emphasis added); *see also In re Randbre Corp.*, 66 B.R. 482, 485 (Bankr. S.D.N.Y. 1986). "[C]ourts must look to the totality of the circumstances in determining whether notice was reasonable." *In re Dinova*, 212 B.R. 437, 443 (B.A.P. 2d Cir. 1997) (*quoting In re Chapman,* 154 B.R. 258, 263 (Bankr. N.D. Ill. 1993).

Here, the factual nature of the allegations is even clearer, as the inquiry into the sufficiency of notice must begin with the question of whether the Photographers were known creditors. It was improper for the Bankruptcy Court to determine, as a matter of *law*, that the Photographers were not known creditors entitled to actual notice within the context of deciding the Motion to Dismiss. Rather, the Bankruptcy Court was required to accept the well-pled allegation that the Photographers were known creditors entitled to actual notice.

D. The Bankruptcy Court Recast the Photographers' Complaint In An Attempt to Rationalize Its Dismissal

In the only instance in which the Bankruptcy Court accepted the well-pled allegations of the Adversary Complaint, it mischaracterized the nature of the Photographers' cause of action. *See* Appendix at A-1467, A-1474. Specifically, the Bankruptcy Court re-cast the Adversary Complaint as a request for modification of the confirmed Plan, rather than a claim for declaratory relief as to whether specific plan provisions are enforceable against the Photographers. In so doing, the Bankruptcy Court violated the fundamental principle that a plaintiff is the master of its complaint. *Price v. Caruso*, 451 F.Supp.2d. 889, 893 (E.D. Mich. 2006); *Hochroth v. William Penn Life Ins. Co. of N.Y.*, No. 03Civ.7286, 2003 WL 22990105, at *1 (S.D.N.Y. Dec. 19, 2003). The plaintiff can "characterize his causes of action as he pleases" and the Bankruptcy Court cannot recharacterize the allegations contained therein

to assist it in dismissing the complaint. *Hochroth*, 2003 WL 22990105 at*1 (*citing Mizuho Corp. Bank (USA) v. Cory & Assocs., Inc.*, 341 F.3d 644, 651 (7th Cir. 2003)). A court "should neither reinvent a plaintiff's complaint nor plead allegations that the plaintiff wishes not to pursue." *Price*, 451 F. Supp.2d at 893.

Despite how the Adversary Complaint was recharacterized by the Bankruptcy Court, the Photographers are not seeking to revoke or amend the Confirmation Order or the Plan. Rather, they are seeking a determination that the Release and Injunction do not apply to them as a result of the lack of due process. This case therefore bears striking procedural similarities to the *Whelton* case recently decided by this Court. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005). In *Whelton*, the plaintiff filed an adversary proceeding seeking a declaratory judgment that it could not be bound by a provision contained in a confirmation order. The debtor defendant argued that the creditor was seeking to revoke the confirmation order and that such request was untimely. This Court found that the adversary proceeding was not one to revoke a confirmation order but one "to declare one of the provisions of a confirmed plan void *ab initio*." *Id.* Additionally, this Court decided that a motion to determine the efficacy of a provision of a confirmed plan was timely when brought within two years of confirmation. *Id.*

The relief being requested by the Photographers is far less drastic than that sought in *Whelton*. The Photographers do not seek a dec-

laration that a plan provision is void *ab initio*. Rather, they seek a far narrower determination that a specific plan provision cannot be enforced against them, due to lack of notice. In no way can the Photographers be said to seek revocation or modification of a confirmed plan. The Bankruptcy Court's findings and conclusions to the contrary are utterly lacking in record support, and are clearly erroneous.

II. THE JUNE 22, 2006 HEARING SHOULD HAVE BEEN CONTINUED TO PROTECT THE PHOTOGRAPHERS' DUE PROCESS RIGHTS

A. Standard of Review

Whether the District Court erred in dismissing as moot the Bankruptcy Court's denial of the Motion to Continue presents a question of law which must be reviewed *de novo*. *See Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994). So long as this Court is able to fashion relief protecting the Photographers' rights, this dispute is not moot. And if this Court concurs with the Photographers that the Adversary Complaint should not have been dismissed, then the denial of the Motion to Continue must be addressed in order to prevent the summary disposition and dismissal of these claims through the Rosenbaum Order.

B. The Court's Substantive Hearing on the Photographers' Rights Violated Their Due Process Rights

The Bankruptcy Court improperly held a hearing on and determined the Photographers' substantive rights on June 22, 2006 (the "June Hearing") when it should have continued the hearing or excluded the Photographers from any relief granted. In the Photographers' initial appeal of that ruling, the District Court found the matter moot because it upheld the Bankruptcy Court's ruling on the Motion to Dismiss.[4]

In another denial of the Photographers' due process rights, the Bankruptcy Court made substantive rulings against them in a hearing held on the motion of a third party in which the Photographers did not participate. It did so while the Photographers had pending the Adversary Complaint which sought substantially similar relief as the third party motion but which had not yet been joined by the parties. Further, at the June Hearing, the Bankruptcy Court recognized that it could not make any such ruling as a result of the pendency of the Adversary Complaint. *See* Appendix at A-561 ("How do I do that [issue a finding or ruling that has preclusive effect on the Photographers] if issue hasn't been joined on a complaint you filed only a few days ago?"). Judge Lifland conveyed a similar position a short time later:

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[4] As with the appeal of the Motion to Dismiss, the Photographers will refer to the Bankruptcy Court and its opinion because the District Court issued no substantive opinion on the issue.

> [a]s should be clear from my inquiry here, the Court is ready to go forward with this matter. Rosenbaum has brought this matter before the Court in one fashion, **the other moving parties are asking for an adjournment in an entirely different fashion. I don't even have the same vehicle to deal with**. Interestingly, the request for declaratory judgment is brought on by motion, not by adversary proceeding. But nevertheless, still we have the issue joined in that regard. And with respect to the motion, the parties have labored mightily to do that and bring this before the Court in a clear and coherent fashion. **So the Court is ready to go forward today. The application for an adjournment is denied. And the request for a special finding that has been made by the moving parties has no foundation or basis** for me to grant; these are two different parties they may be linked in Illinois. **Whatever the issue is with Rosenbaum and how that ends up will be determined at the end of the day**.

Appendix at A-565 – A-566 (emphasis added).

Judge Lifland could not have been clearer—at least in his comments from the bench—that the Photographers' claims had been raised through a different procedural "vehicle," and that Rosenbaum's claims and only Rosenbaum's claims would be determined "at the end of the day." *See*

Appendix at A-566. Judge Lifland also refused to adjourn the hearing, or otherwise to make a finding as to the preclusive effect of the Rosenbaum ruling. *Id.* The remaining argument at the June Hearing addressed the Rosenbaum Motion, **and did not touch on the Photographers' underlying claims, the lack of notice and due process in connection with the Release and Injunction at all**. *See generally* Appendix at A-566 – A-592.

It necessarily follows that, to the extent the Bankruptcy Court purported to decide their claims at the June Hearing, the Photographers were not reasonably apprised of that possibility, and were not given constitutionally sufficient notice of the proposed relief sought against them. *See Mullane*, 339 U.S. at 319; *see also Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 646 (2d Cir. 1998). Because the constitutionally required notice was not given, the Bankruptcy Court lacked authority to decide the claims pled in the Adversary Complaint in the context of the third party motion. *See Mullane*, 339 U.S. at 319; *see also Nelson v. Adams USA, Inc.*, 529 U.S. 460, 466-69 (2000); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 84-87 (1988); *Satcorp Int'l Group v. China Nat'l Silk Import & Export Corp.*, 101 F.3d 3, 5-7 (2d Cir. 1996); *In re ROPT Ltd. P'ship*, 209 B.R. 144, 151-52 (B.A.P. 1st Cir. 1997). The Bankruptcy Court therefore committed reversible error when it included language in the Rosenbaum Order purporting to decide the Photographers' claims. *See* Appendix at A-707.

The Otto Entities may argue that, because the Photographers were represented by counsel at the June Hearing, the Photographers necessarily received sufficient notice of such hearing. This argument, if made, ignores that the existence of some degree of notice of a proceeding does not conclude the constitutional inquiry. *See Mennonite Bd. of Missions*, 462 U.S. at 799 ("[A] party's ability to take steps to safeguard its interest does not relieve [another party] of its constitutional obligations."). The more pertinent question is whether that notice was **adequate**, under the circumstances, to apprise the Photographers of the relief purportedly sought against them at the June Hearing. Adequate notice has two components: (i) delivery and (ii) content. *In re Texaco Inc.*, 254 B.R. 536, 561 (Bankr. S.D.N.Y. 2000); *see also Fogel v. Zell*, 221 F.3d 955, 962-63 (7th Cir. 2000). If the notice is unclear, even if it was received, it will not be deemed to be adequate notice. *In re Texaco Inc.*, 254 B.R. at 561 (*citing Fogel*, 221 F.3d at 962-63); *see also Schermerhorn v. Local 100, Transport Workers Union of Am.*, No. 93 Civ. 6686, 1995 WL 677092, at 5-7 (S.D.N.Y. Aug. 17, 1995).

Here, there can be little doubt that both the delivery and content of the "notice" given to the Photographers was constitutionally insufficient. The mere fact that they were aware of the June Hearing means nothing. The comments made by the Otto Entities—both in their papers and at the June Hearing—signaled that the June Hearing would not be dispositive of the Photographers' claims. Judge Lifland confirmed as much

through his own comments from the bench. *See* Appendix at A-566. Far from receiving sufficient notice of the relief sought against them, the Photographers were persuaded by their opponent and the Bankruptcy Court that the June Hearing was neither the time nor the place to urge their due process arguments.

C. The Rosenbaum Order Deprives The Photographers Of Their Right To Have Their Claims Heard By Adversary Proceeding, As Required By The Federal Rules Of Bankruptcy Procedure.

The Photographers properly sought declaratory relief against the Otto Entities through the filing of an adversary proceeding. *See* Fed. R. Bankr. P. 7001 (6), (7), (9). As the Bankruptcy Court acknowledged, at the time of the June Hearing, the parties were not yet at issue in the Adversary Proceeding. *See* Appendix at A-561. Indeed, the June Hearing was initiated on the **motion** of a **non-party** to the adversary proceeding. Accordingly, the June Hearing was not the appropriate time or place for the Photographers to pursue their request for declaratory relief. The Bankruptcy Court appeared to recognize this fact when it inquired how it could determine preclusive effect before the Otto Entities answered the Adversary Complaint and issue had been joined. *See Id.*

The Bankruptcy Court had no authority to issue a ruling on the Adversary Complaint in the context of the Rosenbaum Motion. *See In re Orion Pictures Corp.*, 4 F.3d 1095, 1098-99 (2d Cir.

1993) (adversary proceeding issues could not be determined in the context of a motion to assume an executory contract); *see also In re Adelphia Business Solutions, Inc.*, 280 B.R. 63, 84 (Bankr. S.D.N.Y. 2002) (in context of §366 motion court cannot try the merits of an actual underlying dispute (*citing In re Orion,* 4 F.3d at 1098-99)). Motions and adversary proceedings are fundamentally distinct. *In re Orion,* 4 F.3d at 1098. A motion is a summary proceeding and an adversary proceeding contemplates "prolonged discovery or a lengthy trial with disputed issues." *Id.* 1098-99 (*citing In re Docktor Pet Ctr., Inc.*, 144 B.R. 14, 16 (Bankr. D. Mass. 1992)). By deciding the Rosenbaum Motion in a manner which foreclosed the relief sought in the Adversary Complaint, the Bankruptcy Court vitiated the requirement of Bankruptcy Rule 7001 that requests for declaratory relief be resolved by adversary proceeding.

Because the Photographers asserted their declaratory judgment claims by means of the Adversary Complaint, those claims could not and should not have been extinguished absent a proper motion to dismiss under Fed. R. Bankr. P. 7012, and compliance with the requirements and standards applicable to review of such a motion. *See* Fed. R. Bank. P. 7012; *see also In re Orion,* 4 F.3d at 1098; *In re Haedo*, 211 B.R. 149, 153-54 (Bankr. S.D.N.Y. 1997) (court required adversary proceeding be brought to determine matter referenced in Rule 7001, even when parties did not object to procedural posture of motion).

The Photographers assuredly did not waive their rights to proceed by the Adversary Complaint. They did not participate in the June Hearing on the merits of the Rosenbaum Motion. *See generally* Appendix at A-556 – A-597. Additionally, the June Hearing did not provide the Photographers with the protections to which they would otherwise be entitled in litigating an adversary proceeding. *In re Orion*, 4 F.3d at 1098; *In re Zale Corp.*, 62 F.3d 746, 763 (5th Cir. 1995). For example, the Photographers never received an answer to their claims and had no opportunity to conduct discovery thereon. (One of the key facts pled by the Photographers in the Adversary Complaint, that they were known creditors of the Debtors and the Otto Entities, is unquestionably in dispute.) Under no construction of the June Hearing can the Otto Entities argue that the Photographers received the rights and protections afforded by a full adversary proceeding—rights and protections to which they were entitled under Rule 7001.

D. Assuming Without Conceding That The June Hearing Was Procedurally And Constitutionally Valid, The Bankruptcy Court Erred In Summarily Dismissing The Photographers' Well Pled Lack Of Notice And Due Process Claims.

The Rosenbaum Order purports to extinguish the Photographers' lack of notice and due process claims in summary fashion. In effect, this order purports to declare that the Release and Injunction are generally enforceable against a broad

range of parties, including but not limited to the Photographers. In making this declaration, the Bankruptcy Court effectively dismissed the Photographers' claim for declaratory relief, and entered contrary declaratory relief requested by the Otto Entities. As explained in the preceding sections of this brief, the June Hearing was constitutionally and procedurally invalid. Yet assuming without conceding that the Photographers claims could have been addressed (or were actually addressed at this hearing), the Bankruptcy Court plainly erred in summarily dismissing these well pled claims for all the reasons set forth in Section I of this Argument.

III. THE BANKRUPTCY COURT AND DISTRICT COURT SHOULD HAVE MODIFIED THE RELEASE AND INJUNCTION TO PRESERVE THE STATUS QUO.

A. Standard of Review

The issue to be decided on this appeal presents a question of law. A review of a denial of a Rule 60(b) motion is subject to an abuse of discretion standard. *Sierra Club v. United States Army Corps of Engineers*, 732 F.2d 253, 257 (2d Cir. 1984).

B. The Injunction Should Have Been Modified for the Limited Purpose Requested.

In declining to grant the requested and limited modification of the injunction, the Bankruptcy Court erred in four distinct respects. First, the Bankruptcy Court misinterpreted controlling Second Circuit law in ruling that the request for modification was untimely. Second, the Bankruptcy Court erred in failing to permit the Photographers to supplement the record on their request. Third, the Bankruptcy Court improperly disregarded a valid and timely request for judicial notice of facts that would have remedied the supposed deficiencies in the record. Finally, the Bankruptcy Court failed to apply the appropriate factors as to whether the Release and Injunction could properly be modified, and consequently reached an erroneous conclusion on this point. The relief requested was narrowly drawn to protect the valid and legitimate interests of the Photographers and the absent class members they seek to represent, without prejudicing the Otto Entities in any legally cognizable manner.

1. Pursuant To Applicable Second Circuit Case Law, The Motion Was Timely Filed.

Contrary to Judge Lifland's conclusions and characterizations, controlling Second Circuit precedent establishes that the Photographers' motion was timely filed. *See Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150, 156 n.2 (2d Cir. 2005). In the *Whelton* case, the Second Cir-

cuit held that a motion challenging the enforceability of a specific plan provision was timely where made within two years of plan confirmation. Judge Lifland offers neither reason nor basis for his attempt to distinguish the *Whelton* decision. Indeed, the plaintiff in *Whelton* occupied a far weaker position than the Photographers, given that such plaintiffs had knowledge of the bankruptcy and plan at issue. *See generally Whelton*, 432 F.3d at 153-54. And the Photographers sought relief far sooner than the Plaintiffs in *Whelton*.

2. The Bankruptcy Court Failed To Provide The Photographers With A Sufficient Hearing On The Merits Of Their Motion.

In what appears to be a recurring theme in the Photographers' various disputes with the Otto Entities, the Bankruptcy Court effectively deprived the Photographers of a meaningful day in court on their request for modification of the injunction. At the hearing, the Bankruptcy Court challenged the sufficiency of the motion, based upon the Photographers' supposed failure to identify the applicable statute of limitations sought to be tolled. When the Photographers requested time and an opportunity to correct this supposed deficiency, Judge Lifland rejected the request, reasoning that the hearing was being held "many, many, many weeks after the issue on this argument had been joined." *See* Appendix at A-1407.

This characterization of the timing and posture of the motion was demonstrably wrong, and constituted a further abuse of discretion by the Bankruptcy Court. The Otto Entities filed their Response (the "Response") to the motion on October 13, 2006, a mere six days before the October hearing. *See generally* Appendix at A-848 – A-864. It was not until October 16, 2006—three days prior to the hearing—that the Otto Entities filed Exhibit A to their Response. *See generally Id.* at A-902 – A-903. Worse still, the argument about the sufficiency of the record (regarding the applicable statutes of limitation) was made for the first time in the Response. Far from being a patent procedural defect apparent to the parties for "many, many, many weeks prior to the hearing," the supposed insufficiency[5] was first brought to the Photographers' attention within one week of the hearing. *See generally Id.* at A-848 – A-864. And Judge Lifland declined to permit the hearing to be adjourned so that the record could be supplemented—**even though it was the Photographers that filed the underlying motion**. In short, the record could not be clearer that the parties were at issue for the briefest of intervals prior to the October Hearing. *Compare* Appendix A-848 A-864 with A-1398 – A-1462. It was an abuse of discretion to deny the Photographers' request to supplement the record, and then to deny the motion based upon the perceived inadequacy of such record.

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[5] As will be explained hereinafter, the Photographers dispute the Bankruptcy Court's conclusion that the requested relief could not have been granted without further detail about the applicable statutes of limitation.

3. Judicial Notice Provided Ample Record Support For The Relief Requested.

The Bankruptcy Court further abused its discretion in failing to take judicial notice of record facts which would support the relief requested in the Motion. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (court can take judicial notice of documents filed in other cases); *Twentieth Century Fox Film Corp. v. Marvel Enters., Inc.*, 220 F. Supp.2d 289, 293 n.4 (S.D.N.Y. 2002) (same). After Judge Lifland rejected the request to adjourn the hearing to permit supplementation of the record, counsel for the Photographers asked the Bankruptcy Court take judicial notice of (i) the date of filing of the Illinois Complaint (January 30, 2004) and (ii) the statute of limitations governing copyright claims (three years). *See* Appendix at A-1412 – A-1413; *see also Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 75 (2d Cir. 1998) (court can take judicial notice of public documents and statues); *see also Kramer*, 937 F.2d at 774. The Bankruptcy Court declined to do so. Had it taken judicial notice of these matters, the supposed insufficiency of the record would have been eliminated. This request for judicial notice was both timely and wholly proper. It is inexplicable why the Bankruptcy Court would have chosen not to honor this request, and Judge Lifland does not even attempt to offer any such explanation. *See generally* Appendix at A-1398 – A-1462.

4. The Bankruptcy Court Abused Its Discretion In Declining To Modify The Plan Injunction For The Limited And Modest Purpose Requested.

The Bankruptcy Court committed plain error by failing to modify the Plan injunction for the limited purpose of allowing the Photographers to file, but not prosecute, their class action complaint. Federal Rule of Civil Procedure 60(b)(5) and/or (6) provide a more than sufficient basis to grant the relief requested by the Photographers. Under either subsection of the statute, the prejudice and harm to the Photographers (and the absent class members they seek to protect) far outweigh any claim of injury by the Otto Entities. A fair and considered balancing of the hardships in this case will admit of only one conclusion: the Otto Entities suffer no cognizable injury if the relief is granted. In contrast, if the Plan injunction is not modified, potential causes of action may be irreparably lost.

The facts and circumstances of this case supply an ample equitable basis for the Plan injunction to be modified as requested by the Photographers. This modification is sought for the narrow purpose of permitting the Photographers to file (but not prosecute) the Amended Complaint. The "power of a court to modify a decree of injunctive relief is long-established, broad, and flexible." *New York State Assoc. for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 967 (2d Cir. 1983). "An injunction is an ambulatory remedy that marches along according to the nature of the proceeding." *Sierra Club v. United States Army*

Corps of Eng'rs, 732 F.2d 253, 256 (2d Cir. 1984). A court should modify an injunction if the injunction "has been turned through changing circumstances into an instrument of wrong." *Sys. Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO v. O.V. Wright*, 364 U.S. 642, 647 (1961) (*quoting United States v. Swift & Co.*, 286 U.S. 106, 114-115 (1932)); *see also Civic Assoc. of the Deaf of New York City, Inc. v. Giuliani*, 970 F. Supp. 352, 358 (S.D.N.Y. 1997).

The Bankruptcy Court clearly abused its discretion in failing to modify the Plan injunction for the modest purpose requested by the Photographers. In the words of the Supreme Court, this injunction "has been turned through changing circumstances into an instrument of wrong." *Sys. Fed'n*, 364 U.S. at 647. A serious due process challenge has been raised as to whether this injunction can bind the Photographers and the absent class members they seek to represent. Unless and until the Release and Injunction are adjudicated to be unenforceable, the Photographers (and other potential class plaintiffs) are barred from filing their claims. While litigation in the Bankruptcy Court and this Court (and appeals therefrom) go forward, statutes of limitation continue to run. If the relief sought by the Photographers is not granted, the mere passage of time may result in the extinguishment of valid claims—a patently inequitable and unjust outcome.

CONCLUSION

For the foregoing reasons, Appellants Bico Stupakoff and Russell James respectfully request that this Court (i) reverse the decision of the District Court in its entirety, (ii) remand this proceeding with direction to the Bankruptcy Court to enter orders (A) denying the Otto Entities' Motion to Dismiss, (B) requiring the Otto Entities to answer the Complaint within ten days, (C) vacating the Rosenbaum Order insofar as it applies to the Photographers and (D) modifying the injunction contained in the confirmed Spiegel plan to permit the Photographers to file their class action complaint against the Otto Entities, and (iii) grant such other and further relief as may be just and fitting under the circumstances.

Respectfully submitted,

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RULE 32(a)(7)(C)
CERTIFICATE OF COMPLIANCE

I, Neal W. Cohen, attorney of record for the Appellants, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in FRAP Rule 32(a)(7). The total number of words in the foregoing brief is 9,585.

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07-1319-bk(CON), 07-1325-bk(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SPIEGEL, INC., ET AL.,

Debtors.

BICO STUPAKOFF AND RUSSELL JAMES,

Appellants,

—against—

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., and OTTO SUMISHO INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ARGUMENT

In the Appellees' Brief (the "Otto Brief") the Otto Entities[1] continue their assault on time honored principles of constitutional and procedural jurisprudence, and commit two fundamental errors of law. First, they wrongly assume that enforcement of the constitutional right to due process of law is discretionary and not mandatory. Second, they incorrectly contend that the status of a creditor as known or unknown can be determined as a matter of law where the complaint contains well pled allegations that the creditors were known. While never specifically denying that they were aware of the Photographers' claims, the Otto Entities continue: (i) to hide behind Judge Lifland's conclusion that the Photographers' were unknown creditors and (ii) to argue that this conclusion is insulated from any meaningful appellate review. These arguments cannot avoid the fundamental fact that the lower court's decision constitutes reversible error – both on constitutional and procedural grounds.

This appeal represents the Photographers' last opportunity to prevent the summary elimination of their claims against the Otto Entities without having received either consideration or constitutionally sufficient notice in connection with this deprivation of their rights.

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[1] Unless otherwise defined herein, defined terms shall have the meanings ascribed to them in the Photographers' opening Appellants' Brief.

I. PROTECTION OF THE PHOTOGRAPHERS' WELL PLED CONSTITUTIONAL RIGHTS WAS MANDATORY, NOT DISCRETIONARY

As an initial matter, the Otto Entities attempt to minimize the constitutional violation visited upon the Photographers as a "discretionary" matter that should be reviewed on appeal under an abuse of discretion standard. *See* Otto Brief at 10 (*citing Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-90 (1995)). As the Otto Entities would have it, Judge Lifland was under no obligation to hear the Photographers' case, and his ruling is therefore entitled to great deference on appeal. This position misreads both the content of Judge Lifland's decision, as well as the important distinctions and qualifications contained in the *Wilton* decision. Judge Lifland reached the merits of the constitutional issues raised by the Photographers, granted declaratory relief **against them,** and dismissed their Complaint under Fed. R. Civ. P. 12(b)(6). The Otto Entities re-write history when they try to re-frame this ruling as a decision to decline declaratory relief.

The Otto Entities likewise miss the mark in their citation to *Wilton*, conveniently omitting the critical limitation on the Supreme Court's holding:

> . . . district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. **We do**

> **not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example cases raising issues of federal law or cases in which there are no parallel state proceedings.**

Wilton, 515 U.S. at 289-90 (emphasis added). By its own terms, the *Wilton* decision turned on the Supreme Court's concern that a declaratory judgment action not divest a state court of its jurisdiction over a parallel proceeding. *Wilton* simply cannot be stretched to fit the circumstances of the present case, where there was no parallel proceeding to adjudicate the Photographers constitutional claims.[2]

Perhaps most importantly, the Otto Entities misreading of *Wilton* deprives the Photographers of **any** forum in which to seek redress for the constitutional violations inflicted upon them. Indeed, the Supreme Court's holding hinged on the fact that the claims pled could be resolved in a parallel state proceeding. *See Wilton*, 515 U.S. at 279-81. Surely the Supreme Court did not rule that there could be **no** forum for resolving the Photographers' constitutional claims. It necessarily follows that the rulings below should be reviewed *de novo* and not under an abuse of discretion standard. *See La Barbera v. J.D. Collyer*

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[2] The Otto Entities make the specious suggestion that the Photographers' Rule 60 motion qualifies as a parallel proceeding. *See* Otto Brief at 10 n.5. This suggestion ignores the key point that the Rule 60 motion does not plead the constitutional claims and seeks the more limited precautionary relief of a modification of the Injunction.

Equip. Corp., 337 F.3d 132, 136 (2d Cir. 2003); *Cont'l Cas. Co. v. Coastal Sav. Bank,* 977 F.3d 734, 736-37 (2d Cir. 1992); *see also Burke v. Ulico Cas. Co.*, 165 Fed. Appx. 125, 126 (2d Cir. 2006) *(citing Allianz Inc. Co. v. Lerner,* 416 F.3d 109, 11.3 (2d Cir. 2005)).

II. RULE 60 IS IRRELEVANT TO THE CLAIMS PLED BY THE PHOTOGRAPHERS OR, ALTERNATIVELY, IS WHOLLY CONSISTENT WITH THE RELIEF SOUGHT

A. Contrary to the Otto Entities' Suggestion, Declaratory Judgment Actions Are an Appropriate Method of Challenging Infringement of Constitutional Rights

The Constitutional guaranty of due process "is not to be [ ] evaded." *See Coe v. Armour Fertilizer Works,* 237 U.S. 413, 419 (1915). Further, due process challenges to unconstitutional orders are not limited to attacking the underlying order based upon Rule 60 of the Federal Rules of Civil Procedure. *Peralta v. Heights Med. Cent., Inc.*, 485 U.S. 80, 81-82 (1988) (relief sought for violation of due process clause was brought by "bill of particulars" pursuant to state law); *In re Graves,* 279 B.R. 266, 275-278 (B.A.P. 9th Cir. 2002) (treating "response" as Rule 59 motion and finding violation of due process clause). Accordingly, federal courts have consistently held that a declaratory judgment action is a proper method to seek redress for constitutional violations of a party's rights, *See Duke Power Co. v. Carolina*

Envtl. Study Group, Inc., 438 U.S. 59, 71 n.15 (1978); *Deveraux v. City of Chicago,* 14 F.3d 328, 330 (7th Cir, 1994) ("As plaintiffs correctly assert, the Declaratory Judgment Act 'expands the scope of available remedies' and permits persons 'to seek a declaration of the constitutionality of the disputed government action.'") (*quoting Duke Power*); *Birnbaum v. Trussell,* 371 F.2d 672, 673-75 (2d Cir. 1966) (plaintiff filed complaint under federal statute for violation of his due process rights); *Durham v. Brock,* 498 F. Supp. 213, 215 (M.D. Tenn. 1980) (First Amendment challenge to state code of professional responsibility pursued by declaratory judgment action); *Earnhart v. Heath,* 369 F. Supp. 259, 260-61 (E.D. Ark. 1974) (analyzing due process violation in context of declaratory judgment action but ultimately denying, on the merits, the requested relief). Therefore, Appellants' declaratory judgment action in this case was the proper vehicle by which to seek redress for the alleged constitutional violations at issue.

B. The Photographers' Claims Are Consistent With and Are Supported by the Requirements of Rule 60

While the Photographers were not obliged to plead their claims under Rule 60, the relief they seek is nevertheless wholly consistent with the elements and requirements of that rule. *See* Fed. R. Civ. P. 60(b). In particular, both Rule 60(b)(4) and 60(b)(6) support and authorize the relief requested.

In seeking to use Rule 60 to deny the Photographers a day in court on their constitutional claims, the Otto Entities have it exactly backwards. The Federal Rules of Civil Procedure should not be interpreted to impair constitutional rights.

> The failure of the Bankruptcy Rules to provide relief to creditors who receive no notice of a bankruptcy and have no knowledge of it cannot deprive those creditors of their substantive right not to have their property rights taken away without notice. Bankruptcy Courts are courts of equity and can provide a remedy when there is a substantive right.

United States v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1091 (6th Cir. 1990) (*citing Pepper v. Litton*, 308 U.S. 295, 303-04 (1939)); *see also In re Argonaut Fin. Svcs., Inc.*, 164 B.R. 107, 115 (N.D. Cal. 1994). In the same vein, the Federal Rules of Civil Procedure are designed to protect and not impair "the due process of law that the Constitution guarantees." *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000). To read Rule 60 as precluding the Photographers' claims would vitiate the maxim that the Rules support due process, and allow a great injustice to be perpetuated in this case. If any of the "rules were construed to preclude challenges to the constitutionality of the procedure [for finding contempt] such a construction would raise questions as to the constitutionality of the rules themselves." *In re Sasson Jeans, Inc.*, 86 B.R. 336, 340 (S.D.N.Y. 1988) (reversing *Lifland, J.* contempt

order issued in violation of due process). Clearly, the Federal Rules of Civil Procedure cannot be used by the Otto Entities as an instrument to further the violation of the Photographers' due process rights.

i. Rule 60(b)(4) Provides a Basis for the Photographers' Requested Relief

Courts have held that Rule 60(b)(4) provides relief to a party from a final judgment if the judgment is void because the court acted in a manner inconsistent with due process of law. *In re Texlon Corp.*, 596 F.2d 1092, 1099-1100 (2d Cir. 1979) (citation omitted). If a party was denied due process, a court has no discretion but must grant relief from the order. *See Steiner v. Atochem, S.A.*, 2002 WL 1870322 (S.D.N.Y. 2002); *see also Ruehle v. Educ. Credit Mgmt. Corp.*, 412 F.3d 679, 684-85 (6th Cir. 2005); *Sea-Land Serv. Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998) (Court had no discretion but to set aside a judgment void for want of due process).

The Photographers satisfy both requirements for relief under Rule 60(b)(4): (i) the judgment is void[3] because the claimants' due process rights

[3] The Photographers have not taken the position that the Release and Injunction is void on its face or as to all creditors. Rather, they have asserted that these provisions are unenforceable against the parties that did not receive constitutionally sufficient notice. It is undeniable that the Photographers have argued for the invalidity of the Release and Injunction **as to them** regardless of the statutory citation or the "particular words" that they may have used. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-70 (2000) ("It

were violated and (ii) the relief is timely requested. In their Complaint, the Photographers argued that they were known creditors entitled to actual notice. They further argued that they failed to receive such notice. In the context of a motion to dismiss, the Bankruptcy Court was required to accept those allegations of fact as true and had no discretion to do otherwise, *See Peralta,* 485 U.S. at 84 n.5. As a result, the Photographers' Complaint stated a *prima facie* claim for a due process violation.

Further, the Photographers' request was timely made in the context of Rule 60(b)(4). *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 190 (2d Cir. 2006); *Whelton v. Educ. Credit Mgmt Corp.*, 432 F.3d 150 (2d Cir. 2005). The one year time limit of Rule 60 does not apply to a voidness challenge under Rule 60(b)(4). *See Grace,* 443 F.3d at 189. Rather, the relief sought must be made only within a reasonable time. *Id.* at 190. " 'Courts have been exceedingly lenient in defining the term 'reasonable time' with regard to voidness challenges.' " *Id.* at 190 (*quoting State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada,* 374 F.3d 158, 179 (2d Cir. 2004) (citation omitted)). Under this precedent, this Court

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is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. But this principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." (Citation omitted). And the general rule does not prevent us from declaring what due process requires in this case, for that matter was fairly before the Court of Appeals.")

has found that a motion made under Rule 60(b)(4) was timely made after four years. *Central Vermont Pub. Serv. Corp. v. Herbert,* 341 F.3d 186, 188-89 (2d Cir. 2003).

Contrary to the Otto Entities' allegations, the Photographers sought the relief shortly after learning of the issues in this case. The second amended class action complaint, which sought to name the Photographers as plaintiffs was tendered to the Illinois District Court not in November 2005, but in April 2006.[4] In June 2006, the Photographers filed their Complaint. A period of a few months is not an extended period of time which should obviate relief under Rule 60(b).

Similarly, the Otto Entities argue that any lack of actual notice is immaterial given that the Photographers have supposedly admitted they would not have known the relief that was being sought against them. *See* Otto Brief at 22. Putting aside that the Otto Entities have not fairly characterized the Photographers' arguments, the Otto Entities wrongly suggest that receipt of notice would not have been helpful to the Photographers. The Supreme Court has found that it is not relevant whether the outcome would have been the same with proper notice. *See Peralta,* 485 U.S. at 86-87. "[It] is no answer to say in [this] particular case due process of law would have led to the same result because he had

[4] The "finding" that the Photographers had to have known about their rights in November 2005 is but one example of the Bankruptcy Judge improperly making findings of fact in response to a motion to dismiss. Such "finding" has insufficient record support to be credited.

no adequate defense upon the merits." *Id.* at 86-87 (*citing Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915)), It is the method of reaching the end result, not necessarily that result, that is important. *Id.* Accordingly, the relief requested by the Photographers is both consistent with and authorized by Rule 60(b)(4).

ii. Relief Under Rule 60(b)(6) Is Also Available to the Photographers

Rule 60(b)(6) likewise authorizes the relief sought by the Photographers.[5] The Otto Entities argue that the Photographers have not shown: (i) that relief is unavailable under any other section of Rule 60(b); (ii) that the motion was made in a reasonable time; (iii) exceptional circumstances; and (iv) extreme hardship. None of these allegations is correct.

The Otto Entities argue that Rule 60(b)(3) governs the relief sought, so relief cannot be available under Rule 60(b)(6). *See* Otto Brief at 18. Despite the Otto Entities' allegations, relief was neither sought nor available under Rule 60(b)(3). Relief is available under Rule 60(b)(3) only within a year from the entry of the order in question. *See* Rule 60(b)(3). More importantly, the Photographers have never alleged that the Confirmation Order was procured by fraud. Nor have the Photographers sought to attack the Confirmation Order generally as to all parties – only its applicability to parties that did not receive con-

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[5] To the extent that this Court agrees that relief is proper under Rule 60(b)(4), relief is not necessary under Rule 60(b)(6).

stitutionally sufficient notice. *See generally, Whelton v. Educ. Credit Mgmt. Corp.*, 432 F.3d 150 (2d Cir. 2005).

As explained above, given the constitutional nature of the injuries to the Photographers, they sought relief well within the range of timeliness previously approved by this Circuit. *See Grace*, 443 F. at 190; *State St. Bank & Trust*, 374 F.3d at 179; *see also Whelton*, 432 F.3d at 156 n. 2. Additionally, this Court has held that in seeking to modify a discharge injunction, the prejudice to the movant weighs more heavily than any delay associated with the requested modification, *See Green v. Welsh*, 956 F.2d 30, 35 (2d Cir. 1992).

This case illustrates exceptional circumstances which militate in favor of granting relief under Rule 60(b) had the Photographers sought relief under that rule. There are few (if any) situations which evidence exceptional circumstances more powerfully than the violation of constitutional due process rights. This follows from the exceptional remedy invoked to rectify a constitutional violation of due process rights – the inapplicability of the order as to the party without notice. *See Peralta* 485 U.S. at 87; *Mullane*, 339 U.S. 306, 319-20 (1950); *In re Rideout*, 86 B.R. 523, 528-31 (Bankr. N.D. Ohio 1988).

Further, the Otto Entities' argument that the Photographers never sought relief against the Debtors is inapposite. The Photographers' actions subsequent to the due process violation are irrelevant. The injury occurred when the Debtors and the Otto Entities failed to give notice to the Photographers that their rights were to be impaired.

See Peralta, 485 U.S. at 87; *Birnbaum,* 371 F.2d at 679.

Extreme hardship will be inflicted upon the Photographers if the Release and Injunction is upheld.[6] If the Release and Injunction is upheld, the Photographers will be deprived of their property without constitutionally mandated due process of law. Nothing further is required to justify relief under Rule 60(b)(6).

III. THE OTTO ENTITIES DISREGARD THE RULE 12(b)(6) STANDARD AND CONSTRUE DISPUTED QUESTIONS OF FACT IN THEIR FAVOR

A. Determinations Of Whether A Creditor Is Known Or Unknown Is A Question Of Fact

The Otto Entities persistently (and incorrectly) argue that the determination of whether creditors are known or unknown is a question of law. *See* Otto Brief at 24. In reaching this conclusion, the Otto Entities badly misread the applicable authority. *See, e.g. In re Chapman,* 154 B.R. 258 (Bankr. N.D. Ill. 1993).

The Otto Entities argue that *Chapman* stands for the proposition that known creditor status is a question of law that can be decided on a motion

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[6] The Otto Entities also suggest that the hardship is not a balancing test between the Photographers and the Otto Entities. Rather, they argue that the balancing should be geared toward the finality of orders. However, as shown above at section II. B. i., a constitutional violation outweighs the requirements of finality.

to dismiss. Otto Brief at 24. This reading ignores the critical details of the *Chapman* decision.

In *Chapman,* the plaintiff *alleged* that he was not given due process of law. *Chapman,* 154 B.R. at 261. However, the allegations of the complaint "clearly demonstrate facially that Mr. Chapman [plaintiff] received adequate notice in compliance with the due process clause of the Constitution." *Id.* at 263. Thus, *Chapman* stands for the unremarkable proposition that status as a known creditor can be determined on a motion to dismiss where the plaintiff, himself, pled receipt of actual notice. Stated another way, the pleadings in *Chapman* eliminated any possible **factual** dispute on the notice question. *Chapman* does not, and cannot, refute the numerous authorities cited by the Photographers in their opening brief which stand for the proposition that receipt of notice is a classic question of **fact.** *See* Appellants' Brief at 19.

B. The Otto Entities Ignore the Record in Concluding That "There Was No Question of Fact Regarding [the Photographers'] Status As Unknown Creditors"

The Otto Entities also argue that "there was no question of fact regarding [the Photographers'] status as unknown creditors." *See* Otto Brief at 24. Contrary to the well pled allegations of the Complaint, the Otto Entities argue that the Photographers failed to plead facts to establish that they were known creditors, *Id.* at 27. Under the Supreme Court precedent of *Bell Atl. Corp. v.*

Twombly, 127 S. Ct. 1955 (2007) and *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), the Photographers have pled sufficient facts to articulate a plausible basis for relief.

The Photographers have alleged, *inter alia*, that (i) they were never given any notice that relief would be sought against them in the Spiegel bankruptcy case, (ii) they were never given notice of the release contained in Spiegel's Plan, (iii) the complaint filed by Peter Rosenbaum Photography Corp. in Illinois put Spiegel and the Otto Entities on notice that there were outstanding claims against them related to numerous photographs utilized by the Otto Entities, including those taken by the Photographers, (iv) the Photographers were known creditors of Spiegel, and parties to an agreement with Spiegel, (v) the Otto Entities knew or should have known that the Plan granted relief for their benefit and against the Photographers, and that the Photographers were therefore entitled to notice of such relief, (vi) the Photographers did not receive notice of the plan and disclosure statement or the Release and Injunction contained therein, (vii) the Otto Entities and Spiegel were aware that liability had been asserted with respect to unauthorized use of copyrighted photographs, (viii) the Plan and disclosure statement were not served upon the Photographers, notwithstanding that the Debtors and therefore the Otto Entities knew or should have known their requested release purported to grant relief against the Photographers, (ix) the Otto Entities knew or should have known that they were seek-

ing relief against the Photographers, (x) the Photographers were known entities entitled to actual notice of the Plan and disclosure statement, as well as the proposed entry of the Release and Injunction, (xi) the Otto Entities and Spiegel failed to provide the Photographers with such actual notice and (xi) the failure to give actual notice to the Photographers violated their rights of procedural and substantive due process, and rendered the release unenforceable as it pertains to the Photographers. *See* Appendix at A-547 – A-550, A-554.

Similarly, the Otto Entities suggest that the Photographers have waived their argument that the Illinois Litigation put the Debtors and the Otto Entities on notice of the Photographers' claims. Such assertion is incorrect. The Photographers have continually urged that one of the bases upon which they were known creditors was the Illinois Litigation. *See* Appellant's Brief at 9.

Further, the Otto Entities make the illogical argument that they do not have notice obligations to the Photographers, only the Debtors do. This argument ignores that it is the Otto Entities who received the benefit of and are seeking to enforce the Release and Injunction. It necessarily follows that the Otto Entities have an obligation to demonstrate that constitutionally sufficient notice of this provision was given – whether by the Otto Entities, the Debtors, or someone else. The Complaint properly alleges that the Photographers were entitled to, but did not receive, actual notice of the Release and

Injunction. Therefore, the Complaint cannot be dismissed on its face.

C. The Otto Entities' Arguments Evidence Why the Question of Notice Must be a Question of Fact

The Otto Entities also argue that if the determination of known creditor status is a question of fact, the inquiry would require specificity as to the basis of such knowledge. *See* Otto Brief at 29. This argument illustrates the very reason why the determination of known creditor status presents a question of fact. The only way to develop the specificity the Otto Entities believe is required is through an evidentiary hearing which the Photographers were precluded from conducting by virtue of Judge Lifland's ruling.

Whether a creditor was "reasonably ascertainable" is a question of fact. *See Tulsa Prof'l Collection Servs., Inc.*, 485 U.S. 478, 491 (1988) ("Whether appellants' identity as a creditor was known or reasonably ascertainable by appellee cannot be answered on this record."); *see also Mullane*, 339 U.S. at 319. Further, courts in this Circuit have determined that a creditor is known if a debtor "knew or should have known" about the existence of the creditor. *See In re New York Trap Rock Corp.*, 153 B.R. 642, 646 (Bankr. S.D.N.Y. 1993); *see also Argonaut Fin. Svcs.*, 164 B.R. at 112. There can be no question that based upon the Otto Entities' illicit use of the photographers and the existence of the Illinois Litigation, the Photographers were known creditors entitled to actual notice. Lastly, despite all of

their arguments, the Otto Entities never state that they were unaware of the Photographers' claims.

IV. THE DISTRICT COURT'S FINDING OF MOOTNESS WILL BE ERROR IF THE PHOTOGRAPHERS ARE SUCCESSFUL ON THE REMAINDER OF THEIR APPEALS

The District Court's ruling that the Photographers' appeal from the August Opinion is moot will be incorrect if this Court determines that the Photographers' due process rights were violated. In summarily upholding the Bankruptcy Court's determination to dismiss the Complaint, the District Court found that the appeal of the August Order was moot. *See* Appendix at A-1551 – A-1552. However, the appeal is not moot if it is determined that the Complaint was legally sufficient and the adversary proceeding should proceed. In fact, if the Complaint is viable, the August Opinion purportedly forecloses the relief sought by the Photographers, again without an opportunity for a full hearing on the merits,

As a matter of law, if this Court reinstates the Complaint, it can also order that the August Opinion be modified so as to not foreclose the Photographers' constitutionally protected due process rights. *See Celle v. Filipino Reporter Ents. Inc.*, 209 F.3d 163, 191 (2d Cir. 2000) (modifying order from below instead of remanding for new determination); *Weiss v. Bonsai*, 344 F.2d 428, 430 (2d Cir. 1965). Such a ruling would preserve scarce judicial resources and not require

the District Court (or the Bankruptcy Court) to engage in hearings and findings regarding an issue which can only be determined in one manner – that because the Photographers rights were violated, the August Opinion cannot stand and must not apply to the Photographers' claims, *Hospital Assoc'n of New York State, Inc. v. Toia,* 73 F.R.D. 565, 568 (2d Cir. 1977) (appellate court can determine issue of law instead of remanding case if only one possible outcome); *see also Pullman-Standard v. Swint,* 456 U.S. 273, 292 (1982) (same).

In their Otto Brief, the Otto Entities seek to preserve for themselves the right to supplement their brief if this Court determines to reach the merits of the appeal of the August Opinion, Such request is wholly improper and should not be granted. The Otto Entities had an opportunity to brief the issues that they believed relevant to this appeal. Clearly, the Otto Entities believed that their best argument was to suggest that the Photographers invoked the improper procedural remedy and that the Photographers should have requested a remand to the District Court. If this Court disagrees, they are seeking the right to make further argument. Such additional argument should not be allowed because it was waived in the first instance.[7]

[7] Further, the Otto Entities agreed with the Photographers that each party's brief was to be limited in length. The Photographers opening brief was to be 40 pages or less.

V. THE OTTO ENTITIES FAIL TO ARTICULATE ANY COGENT THEORY FOR DENYING THE MOTION TO MODIFY THE RELEASE AND INJUNCTION

The Otto Entities concoct a myriad of reasons why the Bankruptcy Court should not have modified the Release and Injunction for the benefit of the Photographers. Like their other arguments, these contentions are unavailing.

In particular, the Otto Entities suggest that the Photographers seek to modify the Plan. In fact, they rename the Photographers' motion from Motion of Bico Stupakoff and Russell James to Modify Plan Injunction for Limited Purpose of Filing Claims in Illinois Litigation Pending Adjudication of Validity of Plan Release (the "Motion to Modify") to "Plan Modification Motion." *See* Otto Brief at 34. Contrary to the Otto Entities' argument, the Photographers are not seeking to modify the Plan. Rather, they are merely seeking limited relief from the Release and Injunction (without conceding its validity), so as to preserve

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The Otto Entities' response brief was to be 45 pages or less. The Photographers' reply brief was to be 22 pages or less. This agreement was confirmed by Order of this Court on May 14, 2007. The Otto Entities' brief utilized their full 45 pages. Accordingly, any subsequent briefing to which they feel they are entitled is foreclosed because their brief has reached its page limit.

On a more practical level, if the Otto Entities are entitled to supplement their brief, equity would require that the Photographers be entitled to respond. Such supplemental briefing would unnecessarily delay any resolution of this matter.

the status quo while the Photographers' constitutional claims are litigated.

A. Modifying a Plan Injunction Does Not Implicate Section 1127

The Photographers' request to modify the Release and Injunction does not implicate section 1127 of the Bankruptcy Code. The Photographers are not seeking to modify the Plan. Rather, they are seeking a declaration that the Release and Injunction does not apply to them.

Courts routinely grant motions to modify plan injunctions and discharge injunctions. *See Green,* 956 F.3d at 33-35; *see also In re Hendrix,* 986 F.2d 195, 198-200 (7th Cir. 1993); *In re Jet Florida Sys., Inc.,* 883 F.2d 970, 972-76 (11th Cir. 1989); *Perez v. Cumberland Farms, Inc.,* 213 B.R. 622, 623-24 (Bankr. D. Mass. 1997) (citations omitted). Such courts do so not under the auspices of section 1127, but under a court's equitable power to modify an injunction which it has previously entered. *In re Hendrix,* 986 F.2d at 198-200; *Perez,* 213 B.R. at 623-24. This case is no different than those cited. Thus the Motion to Modify does not implicate section 1127.

B. Rule 60(b)(5) Is an Appropriate Remedy For a Post-Confirmation Discovery of a Constitutional Violation

Rule 60(b)(5) provides that a court may relieve a party from a final judgment if it is no longer equitable that the judgment should have prospective application. *See* Rule 60(b)(5). The Otto Entities argue that there are no changed cir-

cumstances which would require modification of the Release and Injunction. *See* Otto Brief at 36-37.

The Otto Entities seek to differentiate the cases cited by the Photographers on the basis that there has been no change in circumstances in this case and the mere passage of time is insufficient to provide relief. The Otto Entities are wrong – circumstances in this case have changed since the entry of the Release and Injunction. In making their argument, the Otto Entities take one basis for the denial of a motion made under Rule 60(b)(5) and argue that that is the only basis upon which relief can be granted. *See* Otto Brief at 37. Although no change in law has occurred, that is not determinative as to the Photographers' claims. There has been a very real change in circumstances in this case – the Photographers were much belatedly advised that the Release and Injunction had been entered and purportedly was applicable to their claims. This belated notice constitutes a change in circumstances as to the Photographers which warrants the relief requested. *See Sys. Fed, No. 91 Ry. Employees' Dept; AFL-CIO v. Wright*, 364 U.S. 642, 647-51 (1961). Any argument otherwise is simply unavailing.

CONCLUSION

The Otto Entities are determined to deny the Photographers their day in court. These efforts do violence to the constitutional principle of due process as well as the standard for resolving a

motion to dismiss. The orders below should be reversed so that the merits of the Photographers' well pled constitutional claims can be tested.

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE OF COMPLIANCE

I, Neal W. Cohen, attorney of record for the Appellants, do hereby certify that the foregoing brief complies with the type-volume limitation as set forth in FRAP Rule 32(a)(7). The total number of words in the foregoing brief is 4584.

Dated: New York, New York
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ADDITIONAL STATUTORY PROVISIONS

Section 1141(a) of the Bankruptcy code, 11 U.S.C.A. § 1141 (a), provides:

> Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

Federal Rules of Bankruptcy Procedure, Rule 8002, Time for Filing Notice of Appeal, provides:

> **(a) Ten-day period**
>
> The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof.

If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) Effect of motion on time for appeal

If any party makes a timely motion of a type specified immediately below, the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion:

(1) to amend or make additional findings of fact under Rule 7052, whether or not granting the motion would alter the judgment;

(2) to alter or amend the judgment under Rule 9023;

(3) for a new trial under Rule 9023; or

(4) for relief under Rule 9024 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment, order, or decree but before disposition of any of the above motions is ineffective to appeal from the judgment, order, or decree, or part thereof, specified in the notice of appeal, until the entry of

the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party, in compliance with Rule 8001, to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment, order, or decree shall file a notice, or an amended notice, of appeal within the time prescribed by this Rule 8002 measured from the entry of the order disposing of the last such motion outstanding. No additional fees will be required for filing an amended notice.

(c) Extension of time for appeal

(1) The bankruptcy judge may extend the time for filing the notice of appeal by any party, unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, § 922, § 1201, or § 1301;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363;

(C) authorizes the obtaining of credit under § 364;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365;

> **(E)** approves a disclosure statement under § 1125; or
>
> **(F)** confirms a plan under § 943, § 1129, § 1225, or § 1325 of the Code.
>
> **(2)** A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of the time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

28 U.S.C.A. § 1334, Bankruptcy cases and proceedings, provides:

> **(a)** Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> **(b)** Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings

arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Sub-

section (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

07-1310-bk(L)

07-1319-bk(CON), 07-1325-bk(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

IN RE: SPIEGEL, INC., ET AL.,

Debtors.

BICO STUPAKOFF AND RUSSELL JAMES,

Appellants,

—against—

OTTO (GMBH & CO KG), OTTO DOOSAN LTD., and OTTO SUMISHO INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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satisfaction of Rule 60(b) *was necessary* to prevail on S&J's Complaint when S&J based their Plan Modification Motion on Rule 60(b).[9]

To avoid Rule 60(b), S&J also rely on *Whelton v. E.C.M.C.*, 432 F.3d 150 (2d Cir. 2005), *see* S&J Br. p. 21, but *Whelton* demonstrates Rule 60(b) applied to S&J's Complaint. In *Whelton*, E.C.M.C. filed a complaint seeking a determination the plan provision discharging the E.C.M.C.'s student loan to the debtor was "void *ab initio*". 432 F.3d at 156 n. 2. This Court found that as E.C.M.C. sought relief from a confirmation order, Rule 60(b), including its time limitation, governed E.C.M.C.'s complaint. *See id.* ("This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void *ab initio*. Accordingly, E.C.M.C. was bound only by the 'reasonable time' limitations of Rule 60(b)(4) . . . ."). The fact S&J sought relief under a Rule 60(b) subsection other than Rule 60(b)(4) does not alter the conclusion Rule 60(b) controls.

S&J also incorrectly imply Rule 60(b) was inapplicable here because inadequate notice automatically would exempt S&J from the Release. *First*, S&J cite no case expressly contradicting the cases requiring satisfaction of Rule 60(b)

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[9] *See* A-1402-03. The Plan Modification Motion and S&J's Complaint both sought relief from the Confirmation Order so S&J could sue Appellees. The Plan Modification Motion just sought such relief on an interim basis. Although S&J insisted they never conceded Rule 60(b) governed S&J's Complaint, S&J's actions spoke louder than words.

when seeking a determination on adequacy of notice in order to obtain relief from a confirmation order. *See* fn. 6. *Second*, as a remedy, the cases addressing inadequate

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(3)

No. 07-1552

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IN THE

Supreme Court of the United States

BICO STUPAKOFF AND RUSSELL JAMES,
Petitioners,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD.,
AND OTTO SUMISHO INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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BICO STUPAKOFF AND RUSSELL JAMES,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

Respondents offer a host of far-reaching equitable arguments against Petitioners' constitutional claims, boldly suggesting that "it is inconceivable that the Bankruptcy Court ever would have granted relief permitting Petitioners to pursue Respondents" given, *inter alia*: the consideration paid for the Release and Injunction; the relative culpability of the Respondents; the alleged availability of relief against other parties; and the Petitioners' alleged delay. (Opp. 29-36.) In essence, Respondents argue that Petitioners'

constitutional claims are subject to an equitable balancing test wherein the alleged harm to Respondents and other parties *outweighs* Petitioners' right to notice.

In making this argument, Respondents have perfectly framed the critical due process dispute raised by the Petition. Contrary to Respondents' argument, and setting aside their distortions of the equities, *there is no balancing process when it comes to due process*. *Mullane*'s requirement of notice and opportunity for hearing is an absolute, baseline requirement. The level of notice required may be flexible and case-dependent, but if the minimum required level of notice is not provided, any resulting order or judgment is a nullity that can *never* be enforced. Thus, an order approving a bankruptcy plan release and injunction, procured through constitutionally insufficient notice, can never become enforceable against parties who did not affirmatively seek to enforce their rights within the "reasonable time" contemplated by Rule 60(b).

Contrary to Respondents' suggestion, a substantial and mature circuit split persists on this important issue. The majority of federal circuits endorses Petitioners' position. (Pet. 16.) *See* 11 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2862 (2d ed. 1995) (void judgment "cannot acquire validity" because of laches). In these circuits, the "reasonable time" requirement of Rule 60(b) does not give courts discretion to reject challenges to the enforceability of orders entered without notice. (Pet. 21-22.)

Consistent with the *minority* view, the court of appeals in this case rejected the majority rule, holding that the bankruptcy court had discretion to

dismiss as untimely (under Rule 60(b)) Petitioners' request for a declaration that the Release and Injunction were unenforceable for lack of notice. (Pet. App. 4a.) Unless this Court grants review, Petitioners will now be foreclosed from challenging the validity of the Release and Injunction, effectively making it enforceable. This Court should grant certiorari to resolve this conflict among the federal circuits.

1. Respondents assert that Petitioners are asking this Court to review an issue that "was not litigated in (or decided by) any of the three courts below." (Opp. 11.) This argument completely misses the mark. Petitioners' claim that the Release and Injunction are void and unenforceable against them due to lack of notice was the central issue of the adversary proceeding and briefing below. (JA545-46; JA820.) Moreover, citing many of the same cases they rely on now, Petitioners argued below that, because the Release and Injunction is unenforceable against them, they were not required affirmatively to modify or vacate confirmation *at all*. (Reply App. 15a-17a.[1]) Petitioners have consistently argued that Rule 60(b) (with its limitations) is inapplicable to their due process claims. (Reply App. 13a-15a; JA820 n.3, JA830.) The proceedings below more than adequately support the question framed in the Petition.[2]

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[1] Petitioners' Reply Brief to the District Court on appeal of the dismissal of the adversary proceeding is reproduced as Appendix A.

[2] The exact question presented need not have been litigated below. A party who raised a *claim* below "can make any argument in support of that claim." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Likewise, the party may "frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Id.* at 535.

Respondents argue that "the entire focus of the Petition is the newfound assertion that Petitioners sought relief from a 'void' judgment under Rule 60(b)(4)." (Opp. 11.) This is Respondents' reinvention of the issue, not the issue Petitioners presented. Petitioners *do not* claim that they sought relief explicitly or implicitly under Rule 60(b)(4). To the contrary, Petitioners continue to deny that any part of 60(b) applies to or limits their ability to pursue their request for relief.[3] The only reason that 60(b) has become an issue is that *Respondents* insisted (and the bankruptcy court agreed) that Petitioners' adversary proceeding should be treated as a 60(b) motion.[4]

Respondents cite two pages of bulleted quotations purporting to show that Petitioners did not assert below that the confirmation order was "void." (Opp.

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[3] Some of Petitioners' cases hold that 60(b)(4) motions seeking to vacate a void judgment or order are not subject to the "reasonable time" requirement. But the principle that underpins these cases—as well as the cases that do not deal with 60(b)(4)—is that a void order can never become valid through the passage of time. This broad principle applies to *any* request for relief based on voidness, whether brought under 60(b)(4) or as a separate proceeding (as here).

[4] Respondents note that Petitioners raised Rule 60(b)(4) in their Reply to the court of appeals but argued that they *met* the reasonable time limitation, rather than that it did not apply. (Opp. 18.) Respondents take this argument out of context. Petitioners never abandoned their position that "the Photographers were not obliged to plead their claims under Rule 60." (Opp. 62a.) They merely argued, in the alternative, that they met the requirements of both 60(b)(4) and 60(b)(6), which, under current Second Circuit law, include seeking relief in a reasonable time. Petitioners' argument does not contradict or foreclose review of the broader proposition that 60(b) limitations do not apply.

14-16.) This is a semantic game. Petitioners have always made clear that they seek "a declaration that, because of the lack of notice and due process afforded, the Release and Injunction cannot be enforced against them." (Opp. 14.) The true point of these quotations is that, beyond declaring the order unenforceable as to them, Petitioners do not ask the bankruptcy court to vacate, rescind, or hold void the *entire order*. This remains Petitioners' position.

Finally, Respondents urge that the court of appeals did not *rule* on the question presented. But this is precisely what the court did: It held that the bankruptcy court had discretion to dismiss as untimely under Rule 60(b) Petitioners' request for a declaration that the Release and Injunction is unenforceable. (Pet. App. 4a.) That Petitioners sought a declaratory judgment is immaterial. Although courts generally have discretion not to hear declaratory judgment actions, the bankruptcy court erred because it based its ruling on the constitutionally impermissible application of the "reasonable time" limit to a due process challenge. Moreover, the court did not abstain from ruling; it affirmatively dismissed the case based both on the purported delay and the merits, precluding Petitioners from any further challenge, anywhere, to the enforceability of the Release and Injunction.

2. Not only is the question presented in the Petition squarely before this Court, but it reflects a mature circuit split.[5] (*See* Pet. 19-22.) Respondents deny that Second Circuit law conflicts with the

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[5] Several state courts examining federal law on this issue have explicitly noted this circuit split. *See Greenfield Hill Invs., LLC v. Miller*, No. W.C.1990-0830, 2005 WL 827017, at *5 (R.I. Super. Ct. Apr. 8, 2005); *McDaniel v. U.S. Fid. & Guar. Co.*, 478 S.E.2d 868, 871 (S.C. Ct. App. 1996).

majority view. (Opp. 21.) This argument ignores the plainly stated law of the circuit, that a 60(b)(4) motion must be made within a reasonable time. *See Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 191 (2d Cir. 2006)[6]; *Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d Cir. 1997). Although Second Circuit cases have stated that the requirement is "exceedingly lenient," *Beller & Keller*, 120 F.3d at 24, they have never held it inapplicable, and the Second Circuit has rejected voidness challenges as untimely. *See, e.g.*, *Abondolo v. Faraldi*, 234 F.3d 1261, 2000 WL 1721132, at *4 (2d Cir. 2000) (voidness challenge untimely after approximately two years). Indeed, it held *in this case* that Petitioners' request for relief was untimely after only seven months. District courts within the circuit routinely apply the "reasonable time" requirement. *See, e.g.*, *United States v. Brooks*, No. 00-CV-4131, 2007 WL 4441221, at *2 (E.D.N.Y. Dec. 17, 2007); *Tarascio v. United States*, 198 F.R.D. 321, 323 n.1 (D. Conn. 2000) (had motion been brought under 60(b)(4), "it would not have been timely [because] [t]hree years is not 'a reasonable time' in the context of Rule 60(b)"); *Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 277 (S.D.N.Y. 1996) (denying voidness motion "not made within the obligatory 'reasonable time'").

Respondents also mischaracterize the law of other minority circuits. The First Circuit has explicitly acknowledged a "temporal requirement" applicable to 60(b)(4) motions. *Farm Credit Bank of Baltimore v. Ferrera-Goitia*, 316 F.3d 62, 67 (1st Cir. 2003).

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[6] The *Grace* court's agreement with the district court's conclusion that the Rule 60(b)(4) motion was timely, 433 F.3d at 191, does not, as Respondents suggest, undermine Petitioners' argument that the Second Circuit follows the minority rule.

Relying on *Farm Credit*, district courts within that circuit apply the "reasonable time" requirement. (Pet. 21 n.9.) Likewise, the Eighth Circuit recently stated that the "reasonable time" limit applied to a voidness motion. *Baldwin v. Credit Based Asset Servicing & Securitization*, 516 F.3d 734, 737 (8th Cir. 2008). Courts within the Sixth Circuit routinely apply the "reasonable time" requirement. (Pet. 20.) *See United States v. Leprich*, 169 Fed. Appx. 926, 932 (6th Cir. 2006) (affirming denial of 60(b)(4) motion as time-barred); *United States v. Dailide*, 316 F.3d 611, 618 (6th Cir. 2003) (affirming denial of relief and holding 60(b)(4) attack on void judgment "is only cognizable if brought within a reasonable time"); *Daniel v. Trans Union Consumer Reporting Agency*, No. 01-CV-73552, 2008 WL 2245220, at *2 (E.D. Mich. May 30, 2008) (three-year delay unreasonable); *Brown v. Smith*, No. 97-CV-71827-DT, 2006 WL 3469608, at *1 (E.D. Mich. Nov. 20, 2006) (over seven-year delay unreasonable); *In re LWD, Inc.*, No. 5:06-CV-69-R, 2007 WL 1035149, at *6 (W.D. Ky. Mar. 30, 2006) (less than two-year delay unreasonable).

Taken together, the Petition and Opposition highlight the importance of resolving this circuit split. The minority rule subjects the enforcement of fundamental due process rights to a variety of equitable and discretionary considerations. By granting the Petition and accepting the majority rule, the Court would assure that the dramatic modifications of property rights that occur regularly in bankruptcy court would remain subject to the fundamental safeguard of due process of law.

3. Respondents urge the Court to reject this Petition based on a laundry list of purported "futility" arguments—reasons they contend Petitioners' claims

would fail, even if this Court were to decide in Petitioners' favor. These arguments are meritless. Not only does this case precisely frame an important issue on which the circuits are split, but a favorable decision would give Petitioners a genuine opportunity to pursue their claims.

Respondents first argue that Petitioners' challenge to the enforceability of the Release and Injunction would have been barred by *res judicata*, the equitable mootness doctrine, and the 180-day time limit applicable to revocation under Section 1144 of the Bankruptcy Code. (Opp. 13.) However, no court has ever determined that any of these arguments bars Petitioners' claims. Respondents' untested contentions are not an appropriate basis to reject the Petition.[7]

Respondents also assert that Petitioners' "failure" to raise Rule 60(b)(4) below waives their ability to rely on that rule. (Opp. 27.) This is the same circular argument they make throughout their Opposition. Petitioners do not seek to "rely on" Rule 60(b)(4) and have not waived their arguments.[8]

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[7] Moreover, each of the arguments is substantively flawed. The *res judicata* principle of *Stoll v. Gottlieb* is limited to a court's determination of its own *jurisdiction*, where jurisdiction was a *contested issue*. 305 U.S. 165, 172, 177 (1938). *Stoll* does not support the proposition that *res judicata* precludes notice-based challenges to confirmation orders. Likewise, *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005), did not apply equitable mootness to a due process challenge and does not support enforcement of a void order under that doctrine. Lastly, Section 1144 applies only to requests to revoke a plan based on fraud, not to claims that the plan is void. *See In re Rideout*, 86 B.R. 523, 530 (Bankr. N.D. Ohio 1988).

[8] Moreover, a number of courts adopting the majority position hold that relief from a void order is mandatory, even where the party seeking relief failed to raise the voidness issue below. *See,*

Respondents next argue that Supreme Court review would serve no purpose because the bankruptcy and district courts found that Petitioners' complaint failed to state a claim that Petitioners were known creditors. (Opp. 28.) Petitioners believe these rulings erroneously looked beyond the pleadings on a Rule 12(b)(6) motion and ignored well-pled allegations that the Debtors and Respondents knew of their claims. The court of appeals, however, never addressed the merits arguments, affirming based solely on timeliness. (Pet. App. 3a.) Thus, this Court's review will not be futile. If the Court reverses, the court of appeals will need to rule on the merits of the Rule 12(b)(6) dismissal, potentially allowing the case to go forward.

Nor is there any basis for Respondents' contention that Petitioners' claims are barred by the statute of limitations or equitable estoppel. (Opp. 29.) No evidence in the record indicates that the limitations periods for *any* of Petitioners' claims have run. Moreover, most states have statutory tolling provisions providing that an injunction preventing prosecution of an action suspends the statute of limitations. *E.g.*, 735 ILL. COMP. STAT. 5/13-216 (2007); NY C.P.L.R. § 204 (McKinney 2008). Even where there is no statute, the limitations period is equitably tolled. *See*

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e.g., *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). Respondents' reliance on *Page v. Schweiker*, 786 F.2d 150 (3d Cir. 1986), is misplaced. Although the voidness issue there was not before the court because it had not been raised below, the Third Circuit acknowledged that the failure to raise this issue below did not waive it: "even now the Secretary may not be foreclosed from litigating this issue in the district court in the first instance." 786 F.2d at 153.

In re Parmalat Sec. Litig., 493 F. Supp. 2d 723, 731-32 (S.D.N.Y. 2007).

Respondents also argue that Petitioners' claims are futile because, even if the Release and Injunction were declared void, it is "inconceivable" that the bankruptcy court would allow Petitioners a remedy. (Opp. 29, 32.) This argument is senseless because Petitioners are not seeking any remedy from the bankruptcy court other than a declaration that the Release and Injunction is void and unenforceable against them. If the bankruptcy court grants this declaration, there is no further remedy for it to withhold based on equity. Moreover, if an order is void, relief is mandatory.[9] *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 n.8 (10th Cir. 1979). None of Respondents' cases would give the bankruptcy court discretion to find the Release and Injunction unenforceable and then require petitioners to comply with it.[10]

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[9] As noted in the Petition, the bankruptcy court may have discretion to determine how to address the remainder of the Release and Injunction, *i.e.*, whether to revoke or vacate the entire plan or merely to declare that the Release and Injunction is unenforceable as to Petitioners. (Pet. 15 n.7.) This does not mean the court could hold a void order enforceable. In any event, Petitioners have not sought revocation.

[10] *United States v. One Toshiba Color Television*, 213 F.3d 147 (3d Cir. 2000), did not hold that a void judgment could be enforced because of laches. Rather, it held that the judgment was void but that laches might still be an issue in a subsequent proceeding to obtain affirmative relief. *In re Center Wholesale, Inc.*, 759 F.2d 1440 (9th Cir. 1985), did not order enforcement of a void order. It suggested a remedy available to a secured creditor whose interests had been inadequately protected. *In re C.S.T. Constr. Co.*, 21 B.R. 840 (Bankr. N.D. Ill. 1982), involved creditors (with actual knowledge of the bankruptcy) who sought to file a late proof of claim. *In re Columbia Ribbon & Carbon*

Furthermore, the equities are far from as one-sided as Respondents suggest. (Opp. 31-32.) As an initial matter, Respondents are not the blameless parties that they suggest themselves to be. Respondents are alleged to have misappropriated Petitioners' photographs and published them in catalogs and on the internet in violation of Petitioners' copyrights. Respondents are further alleged to have been aware of Petitioners' potential claims and now seek to evade liability. Respondents therefore lack any legitimate basis to argue that Petitioners should be foreclosed from recovery because they "failed" to pursue claims against the Debtors. Indeed, Respondents argue out of both sides of their mouths when they suggest that Petitioners "propose to disrupt a confirmed and largely consummated plan" (Opp. 34), then fault Petitioners for not having "sought to file late claims against the Debtor" under the same consummated plan. (*Id.* 32).

Finally, Respondents raise the specter of "prejudicing the many other parties affected by and who acted in reliance on the Plan." (Opp. 34.) This is not, under any circumstances, a basis to enforce an order against parties who were not afforded minimum due process. But, in this case, the concern is particularly misplaced. The only relief that Petitioners seek is a declaration that the Release and Injunction is unenforceable against them. Petitioners do not ask to revoke or undo the plan or to obtain relief against any party other than Respondents. And because Respondents are alleged to have known of Petitioners' claims, Respondents will not be surprised or prejudiced by their inability to enforce the Release

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Mfg. Co., 54 B.R. 714 (Bankr. S.D.N.Y. 1985), likewise involved late claims rather than a voidness challenge.

and Injunction against aggrieved parties who never received constitutionally sufficient notice.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 30, 2008

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Chapter 11
Case No. 03-11540 (BRL)
(Jointly Administered)
Adv. Pro. No. 06-1554
Case No. 1:06-cv-09385-NRB

In re: SPIEGEL, INC., *et al.*,
Debtors.

BICO STUPAKOFF and RUSSELL JAMES,
Appellants,

v.

OTTO (GMBH & CO KG), OTTO DOOSAN LTD. AND OTTO SUMISHO INC.,
Appellees.

REPLY BRIEF OF APPELLANTS BICO STUPAKOFF AND RUSSELL JAMES

ON APPEAL FROM AN ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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January 8, 2007

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ARGUMENT

In their opening Appellees' Brief (hereinafter cited as "Appellees' Brief"), the Otto Entities[1] urge two fundamental points: (i) the relief requested by the Appellant Photographers supposedly amounts to an impermissible collateral attack on the Spiegel plan and confirmation order and (ii) the Photographers supposedly failed to adequately plead that they were known creditors entitled to actual notice. *See generally* Appellees' Brief. These contentions reflect a profound misunderstanding of the nature of the due process challenge made by the Photographers, as well as of the specific facts alleged in their Complaint.

The Photographers assert that, because they did not receive constitutionally sufficient notice of the Release and Injunction, these plan provisions are unenforceable against them. R-10, ¶¶1, 66.[2] Simply stated, the constitutional violation rendered these provisions a nullity with respect to the Photographers. It thus makes no sense to characterize the Photographers' position as a collateral attack on the plan and confirmation order. Why would the Photographers need to modify or vacate an order that has no force or effect against them? The limitations on plan modification codified at 11 U.S.C. § 1127(b) therefore have no bearing whatsoever on the Photographers'

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[1] Defined terms not otherwise defined herein shall have the meanings ascribed to them in Photographers' opening brief.

[2] Citations to the record shall reference the items listed in the Record on Appeal attached to the Photographers' opening brief as Appendix I, and shall follow the convention "R-__"). The Otto Entities have used a slightly different numbering convention in their Appellees' Brief. To avoid confusion, the Photographers will continue to cite to the numbering convention set forth in Appendix I to their opening brief.

entitlement to relief. Likewise, Fed. R. Civ. P. 60(b) is either irrelevant to the requested relief, or consistent with such relief.

The Otto Entities likewise miss the mark in their challenge to the sufficiency of the facts pled in the Complaint. The Photographers properly alleged that they were known creditors of both Spiegel and the Otto Entities, and were therefore entitled to actual notice of the relief sought against them via the Release and Injunction. These well pled facts were required to be accepted as true for purposes of resolving the Otto Entities' motion to dismiss, and should have compelled denial of the motion. By treating these facts as conclusions of law that need not be credited as true, the Otto Entities ignore or misstate the applicable authorities, as well as the facts actually alleged in the Complaint.

In short, the Photographers properly stated a claim for declaratory relief based upon a substantial violation of their constitutional rights. The Bankruptcy Court erred in summarily dismissing that claim, based upon the purported legal conclusion that the Photographers were unknown creditors. None of the arguments or record citations contained in the Appellees' Brief can excuse or justify the Bankruptcy Court's error. To the contrary, this brief represents a continuation of the Otto Entities' practice of seeking to adjudicate and extinguish substantial, fact-intensive claims in summary fashion. The Order should be reversed, and the Otto Entities ordered to answer the Complaint within ten days of such reversal.

I. THE DISMISSAL OF THE PHOTOGRAPHERS' COMPLAINT SHOULD BE REVIEWED *DE NOVO*.

As a preliminary matter, the Photographers need to clear up some confusion created by the Otto Entities' statement of the applicable standard of appellate review. *See* Appellees' Brief at 3. By including their own statement of the standard, the Otto Entities signified "dissatisfaction" with the Photographers' statement. *See* Fed. R. Bankr. P. 8010(a)(2)("a statement of the basis of appellate jurisdiction need not be made unless the appellee is dissatisfied with the statement of the appellant"). The Otto Entities assert in their statement that "[a] review of the determination not to invoke the Declaratory Judgment Act is subject to an abuse of discretion standard." *See* Appellees' Brief at 3, *citing Wilton v. Seven Falls Co.*, 515 U.S. 277, 288-90 (1995). In so stating, the Otto Entities evidently urge this Court to review Judge Lifland's order based upon an abuse of discretion standard. That position is wholly without merit.

Concededly, as held by the Supreme Court in *Wilton*, a decision whether to invoke the Declaratory Judgment Act is reviewed for an abuse of discretion. But that citation is wholly inapplicable to this case, where Judge Lifland never made a determination as to whether the Declaratory Judgment Act should be invoked. *See generally* R-28. To the contrary, Judge Lifland reached the merits of the Photographers' constitutional claims, and effectively entered declaratory relief adverse to that sought in the Complaint. R-28 at 9-13. This case thus bears no resemblance to *Wilton*, wherein the District Court entered an order staying a declaratory judgment action involving insurance coverage, so that a parallel state proceeding could go forward. *See Wilton*, 515 U.S. at 279-81.

Judge Lifland did not dismiss the Adversary Proceeding, so that a parallel state case could go forward. Rather, he purported to decide the ultimate constitutional issue. R-28 at 9-13.

The Supreme Court's decision in *Wilton* is more circumscribed in its scope than the Otto Entities suggest:

> . . . district courts' decisions about the propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion. **We do not attempt at this time to delineate the outer boundaries of that discretion in other cases, for example cases raising issues of federal law or cases in which there are no parallel state proceedings.**

Wilton, 515 U.S. at 289-90 (emphasis added). By its own terms, the *Wilton* decision appears to rest on both the propriety of declaratory relief, as well as the presence of the parallel state proceeding.

Likewise, while not yet having reached the issue directly, the Second Circuit has expressed the view that *Wilton* does not compel an abuse of discretion standard of review for a declaratory judgment action decided on grounds other than the trial court's decision to invoke declaratory relief. *See Jenkins v. United States*, 386 F.3d 415, 417 (2d Cir. 2004) (suggesting that *de novo* review may be appropriate where a declaratory judgment action is dismissed for lack of standing); *E.R. Squibb & Sons, Inc. v. Lloyd's & Companies et al.*, 241 F.3d 154, 177 (2d Cir. 2001)("[t]he fact that the high level excess insurers challenge the district court's subject matter jurisdiction to hear this action rather than its discre-

tionary decision to exercise jurisdiction under the Declaratory Judgment Act would seem to suggest that *de novo* review is appropriate").

The foregoing authorities can readily be harmonized with the statement of the standard of review set forth in the Photographers' opening brief—in the Second Circuit, the Bankruptcy Court's granting of a motion to dismiss is reviewed *de novo*. Brief of Appellants Bico Stupakoff and Russell James (hereinafter, "App. Brief"), 1, *citing Conboy v. AT&T Corp.*, 241 F.3d 242, 246 (2d Cir. 2001). Where a trial court purports to decide the ultimate constitutional issue in the case, with no other lower court having the opportunity to pass on such issue, it makes perfect sense that review of that decision would be *de novo*. Where, by contrast, a trial court dismisses or stays a declaratory action, so that a parallel state proceeding may go forward, the *Wilton* decision makes clear that appellate review should recognize the trial court's considerable discretion on this issue. Judge Lifland's Order was not a discretionary decision as to which court or tribunal should resolve the Photographers' constitutional claims. Rather, this Order was a far reaching and incorrect resolution of the ultimate constitutional question. As such, this Order is subject to *de novo* review. The Otto Entities' assertion to the contrary (Appellees' Brief at 3) is simply wrong.

II. THE PHOTOGRAPHERS PROPERLY SOUGHT DECLARATORY RELIEF AS TO THE ENFORCEABILITY OF THE RELEASE AND INJUNCTION, RATHER THAN SEEKING TO MODIFY OR VACATE THESE PROVISIONS.

The Otto Entities devote the lion's share of their Appellees' Brief to the arguments that (i) the Photo-

graphers can only obtain relief by modifying or vacating the Spiegel plan and (ii) the Photographers fail to satisfy the prerequisites for modification or vacatur of the plan and confirmation order, as set forth in 11 U.S.C. § 1127(b) and Fed. R. Civ. P. 60(b). *See* Appellees' Brief at 12-29. In so arguing, the Otto Entities do battle with the proverbial straw men. The Photographers have not predicated their Complaint upon modification or vacatur of the Release and Injunction, and need not have done so. *See generally* R-10. Rather, consistent with applicable precedent, the Photographers have sought declaratory relief as to the consequences of failure to provide them with constitutionally sufficient notice of the entry of the Release and Injunction. In light of that precedent, the Bankruptcy Court committed reversible error in deeming the Complaint to be an untimely and improper collateral attack on the Plan. R-28 at 9- 13.

A. The Photographers Did Not Concede the Applicability of Rule 60(b).

At the outset, the Photographers must correct a significant liberty taken with the record by the Otto Entities. The Otto Entities claim that "as found by the Bankruptcy Court, the Photographers effectively conceded that Rule 60(b) governed the Adversary Complaint when the Photographers relied upon Rule 60(b) as the basis for their Plan Modification Motion." Appellees' Brief at 15. The record clearly discloses the falsity of this claim. The Photographers made no such concession, and actually took care to clarify this issue during oral argument on the Motion to Dismiss and Plan Modification Motion:

> **Your Honor, it [sic] appears to suggest** that because we brought **our motion to modify the plan injunction under Rule 60 that some-**

> **how operates as an admission or a concession that Rule 60 is also the operative authority for the relief requested in the adversary proceeding. We would like to, respectfully suggest that is in [sic] the case.** The reason, Your Honor, is that the adversary proceeding hinges on a due process argument. It's our contention–when Mr. Lipkin presents his motion, we will be happy to make further arguments—that the declaratory action is an appropriate vehicle for resolution of those due process issues; that those issues can appropriately be raised without attacking or vacating the underlying Order; and that the relief we seek in the adversary proceeding is precisely tailored to determine whether or not these provisions can be enforceable against these specific parties in light of the due process arguments we make.
>
> Now, by contrast, Your Honor, **the motion to modify the Plan injunction assumes without conceding that there is an operative injunction, that therefore it is appropriate and not at all inconsistent with the relief we seek in the adversary to seek to modify that injunction** on the same standard that a party would seek to modify a permanent injunction, which is essentially a balancing of the hardships and the prejudice and integral [sic] of the purposes for which the permanent injunction was put in place and the nature of relief sought.

R-27, 6-8 (emphasis added).

Under no stretch of the imagination can the Photographers be said to have "conceded" that Rule 60 governs their entitlement to the relief requested in their Complaint. To the contrary, the Photographers

took great pains to outline the different procedural bases of the two motions, and to make clear that they were entitled to relief without vacating the underlying confirmation order. While Judge Lifland did decide that Rule 60 governed the Motion to Dismiss (R-28, 12), he certainly did not make a finding that the Photographers waived or conceded this point. *See generally* R-28.[3] In arguing for such a waiver, the Otto Entities do not fairly or correctly represent the record.

B. The Due Process Violations Pled by the Photographers Render the Release and Injunction Unenforceable against them, Thereby Eliminating any Need to Modify or Vacate These Provisions.

The thrust of the Otto Entities' argument is that the Photographers have launched a collateral attack on the Spiegel Plan. *See* Appellees' Brief at 12-29. Judge Lifland certainly based much of his ruling on this premise. *See, e.g.*, R-28 at 12 ("[e]ssentially, this Complaint is a collateral attack on a Plan and Confirmation Order that were approved by this Court over a year ago"). However, because the Photographers have pled that they did not receive constitutionally sufficient notice of the Release and Injunction, they have no need to modify or vacate the Spiegel Plan and confirmation order. The decisional authorities overwhelmingly confirm that, under these circumstances, the offending plan provisions cannot be enforced against the Photographers. *See DePippo*

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[3] Judge Lifland's statement that "there is an internal inconsistency on the part of the parties with respect to reliance of the vehicle to be used to determine each motion" is not to the contrary. R-27, 4.

v. Kmart Corp. et al., 335 B.R. 290, 295 (S.D.N.Y. 2005)("**[w]here notice satisfies due process,** an order confirming a reorganization plan operates to discharge all unsecured debts and liabilities, even those of tort victims who were unaware of the debtor's bankruptcy")(emphasis added; internal citations and quotations omitted); *In re U.S.H. Corp. of New York*, 223 B.R. 654, 658 (S.D.N.Y. 1998)(Lifland, J.)(". . . if a creditor is not given notice of the bankruptcy proceeding and the relevant bar dates, its claims cannot be constitutionally discharged"); *see also In re Deutchman*, 192 F.3d 457, 461 (4th Cir. 1999)(payments under Chapter 13 plan would not extinguish IRS liens, owing to failure to give IRS sufficient notice); *In re Linkous*, 990 F.2d 160, 162 (4th Cir. 1993)(confirmation order cannot be given *res judicata* effect if it would result in a violation of secured creditor's due process rights); *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620, 622-23 (10th Cir. 1984)(claim cannot be discharged pursuant to confirmation order where lack of reasonable notice of confirmation hearing violates Fifth Amendment); *In re Newstar Energy of Texas, LLC,* 280 B.R. 623, 626-27 (Bankr. W.D. Mich. 2002) (if a creditor does not receive adequate notice, that creditor is not bound by the confirmation order); *In re Rideout*, 86 B.R. 523, 528-29 (Bankr. N.D. Ohio 1988) (if confirmation order were not vacated, lack of adequate notice would prevent claim from being discharged thereunder). It necessarily follows that 11 U.S.C. § 1127 and Fed. R. Civ. P. 60(b) are facially inapplicable. If the Photographers prevail on their constitutional claim, then the Release and Injunction are necessarily unenforceable against them.

The authorities cited by the Otto Entities simply fail to meet this critical point. *See, e.g., In re Vencor,*

284 B.R. 79, 82-85 (Bankr. D. Del. 2002), *cited in* Appellees' Brief at 20. The Otto Entities assert that the Photographers are "similar" to the creditors in *Vencor*, who unsuccessfully sought to strike the release provisions from a confirmation order. Appellees' Brief at 20. But the creditors in *Vencor* did not make a constitutional challenge to the plan, and the bankruptcy court ascribed no credibility to their lack of notice argument. *See Vencor*, 284 B.R. at 81-86. Instead, the *Vencor* creditors premised their challenge to the plan releases upon their assertions that the confirmation order was procured by fraud, and entered *outside the bankruptcy court's jurisdiction. Id.* The *Vencor* case therefore has no bearing on this case, and certainly does not support the conclusion that the Photographers are obliged to proceed by modifying or vacating the plan and confirmation order. By framing this dispute as a post-confirmation plan modification, the Otto Entities continue to battle straw men, and to fail to address the actual constitutional claims pled in the Complaint.

C. It Is Wholly Proper to Adjudicate Constitutional Violations through the Use of a Declaratory Judgment Action.

As the Otto Entities would have it, a declaratory judgment action "remain[s] subject to section 1127(b), which governs plan amendments, and Rule 60(b), which governs obtaining relief from a final confirmation order in a bankruptcy case." Appellees' Brief at 13. The Otto Entities seem to be arguing that the Photographers cannot obtain declaratory relief on their constitutional claims, without also requesting permission to modify or vacate the plan and confirmation order. The Otto Entities offer no authority for this remarkable assertion, other than *In re G-I*

Holdings, Inc., 328 B.R. 691, 693 (D.N.J. 2005), *cited in* Appellees' Brief at 13. The Otto Entities cite *G-I Holdings* for the proposition that "Plaintiffs may not seek relief under the Declaratory Judgment Act because Congress has enacted a statute that provides for the specific relief requested." *G-I Holdings*, 328 B.R. at 694, *cited in* Appellees' Brief at 13. However, the Otto Entities fail to apprise this Court that the statute precluding declaratory relief in the *G-I Holdings* case was 11 U.S.C. § 524(g)—the statute implementing a channeling injunction for asbestos claims. *See G-I Holdings*, 328 B.R. at 694-99. Nothing in this case suggests that 11 U.S. C. § 1127 or Fed. R. Civ. P. 60(b) is applicable to the Photographers' constitutional claims, and it is misleading for the Otto Entities to suggest otherwise.

There is ample precedent for the Photographers to challenge the enforceability of the Release and Injunction on constitutional grounds, without being simultaneously required to seek relief under 11 U.S.C. § 1127 and/or Fed. R. Civ. P. 60(b). *See Deutchman*, 192 F.3d at 459-61 (Debtor brings declaratory judgment action to determine whether IRS liens will be extinguished under Chapter 13 plan; Fourth Circuit addresses constitutional issues in affirming declaration that liens were not extinguished); *Reliable Electric*, 726 F.2d at 621-23 (Tenth Circuit evaluates bankruptcy court's grant of declaratory relief as to whether claim is discharged in light of inadequate notice to creditor); *Newstar Energy*, 280 B.R. at 626-27 (creditor brings declaratory action to determine whether it is bound by terms of con-firmed plan, given failure to afford such creditor adequate notice); *U.S.H. Corp.*, 223 B.R. at 656-60 (Lifland, J.)(group of homeowners sues for declaration that

they are not bound by terms of confirmed plan).[4] In all of these cases, the parties litigated the issue of whether plan terms could be enforced against a party alleged to have received constitutionally insufficient notice. None of these cases imposed the additional hurdles of compliance with 11 U.S.C. § 1127(b) or Fed. R. Civ. P. 60(b).

The Photographers do acknowledge that there have been instances where parties raising due process objections to a confirmed plan have also sought modification or vacatur of such plan and confirmation order. *See, e.g., Linkous*, 990 F.2d at 161-63; *Rideout*, 86 B.R. at 524-31. However, nothing in these authorities compels the conclusion that a party who did not receive constitutionally sufficient notice of a confirmed plan **must seek to** modify or vacate that plan to protect its rights. For example, in *Linkous*, Piedmont Trust Bank made a Motion to Revoke Order Confirming Plan and Dismiss or Convert Case based, among other grounds, on the insufficiency of notice to the Bank. *Linkous*, 990 F.2d at 161. The bankruptcy court initially dismissed the motions, ruling that the Bank "had failed to protect its interests

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[4] In the *U.S.H.* case, Judge Lifland ultimately dismissed the complaint for failure to state a claim, based upon his conclusion that the Plaintiffs were unknown creditors who were not entitled to receive actual notice of the plan. As will be explained further below, the Photographers respectfully disagree with Judge Lifland's reasoning in the *U.S.H.* decision on a number of points. The Photographers cite the decision here for the limited purpose of showing that in *U.S.H.* Judge Lifland addressed the merits of a constitutional claim through the procedural framework of a declaratory judgment action, without treating the case as a collateral attack on the plan, or otherwise requiring compliance with 11 U.S.C. § 1127 or Fed. R. Civ. P. 60(b). *See generally U.S.H.*

and was too late to challenge successfully confirmation." *Id.* Without addressing the timeliness or procedural propriety of the Bank's motions, the Fourth Circuit ultimately held that due process violations rendered the confirmation order unenforceable as to the Bank, and vacated such order as it pertained to the Bank. *Id.* at 163.

In reaching this decision, the Fourth Circuit explained how constitutional concerns trump the usual finality of a confirmation order:

> . . . a bankruptcy court confirmation order generally is treated as *res judicata*. However, we cannot defer to such an order on *res judicata* grounds if it would result in a denial of due process in violation of the Fifth Amendment of the United States Constitution.

Id. at 162. The Linkous decision demonstrates that a party can obtain declaratory relief as to whether it is bound by a confirmation order without satisfying the prerequisites of 11 U.S.C. § 1127(b) or Fed. R. Civ. P. 60(b).

The *Rideout* decision reaches a similar result via a different analytical path. The Hahns—creditors in that case—filed a motion to vacate the confirmation order, based upon the lack of notice to them of the confirmation hearing. *Rideout*, 86 B.R. at 525. The Debtors opposed the motion, arguing, *inter alia*, that a court cannot vacate a confirmation order absent compliance with 11 U.S.C. § 1144. *Id.* at 526. The Bankruptcy Court ultimately held that (i) the Hahns had not received constitutionally sufficient notice of confirmation and (ii) the proper remedy for such violation was to vacate the confirmation order. *Id.* at 531. The Bankruptcy Court justified vacatur under

both 11 U.S.C. § 105 and Fed. R. Civ. P. 60(b)(4). However, the Bankruptcy Court expressly noted that, were the confirmation order not vacated, the confirmation order would still be unenforceable against the Hahns:

> [a]s a preliminary matter, the Court must confess some puzzlement at the position asserted by Debtors' Counsel. Vacating the "Order Confirming Plan" may be a somewhat unusual approach to the problem presented in this case. However, from the Debtors' perspective, the usual solution appears to be undesirable. **If the Court cannot vacate its Order, the lack of adequate notice would result in the Hahns' claim not being bound by the Plan, and therefore the obligation would not be discharged.** As a practical matter, it is difficult to understand why the Debtors feel that a defective Plan, which would be ineffective, is preferable to simply vacating the Court's Order . . . .

Id. at 528-29 (bold emphasis added; italics in original).

The *Linkous* and *Rideout* decisions can readily be harmonized with the other authorities cited by the Photographers. All of these cases support the proposition that, where constitutionally sufficient notice of plan confirmation is not provided, the confirmed plan cannot be enforced against the parties receiving insufficient notice. While the aggrieved parties have a number of procedural options available to them in this situation, it is wholly proper for such parties to proceed by way of declaratory judgment action. It is also proper, in the context of such an action, for these parties to seek a declaration confirming (i) the constitutional violation and (ii) the resulting lack of

enforceability of the confirmed plan as against such parties. While plan modification or vacatur are potential remedies, they are neither exclusive nor mandatory. And, in the context of a confirmed, substantially consummated plan, the more narrowly tailored remedy sought by the Photographers seems the better outcome for all parties.

The Photographers' position on this issue finds further support in the Second Circuit's decision in *Whelton v. Educational Credit Management Corp.*, 432 F.3d 150 (2d Cir. 2005). In *Whelton*, a student loan creditor filed an adversary proceeding to declare a consolidated student loan nondischargeable. *Whelton*, 432 F.3d at 152. The bankruptcy court ruled that (i) the student loan discharge provisions contained in the plan were outside the scope of relief available under Chapter 13 and (ii) the failure to provide the creditor with "proper notice of the Debtor's intent to discharge the student loan . . . constituted an abrogation of [the creditor's] due process rights." *Id.* at 152-53. Because it found the plan's "discharge by declaration" provisions to be void, the Second Circuit declined to reach the due process issue pled by the creditor. *Id.* at 154, n. 1. However, the Second Circuit expressly found that the insufficiency of notice to the creditor precluded the Debtor from asserting that the terms of the confirmed plan were *res judicata*:

> . . . we reject *Whelton*'s argument that the Bankruptcy Court approval of his Plan serves to preclude challenges such as ECMC's. It is true that the Bankruptcy Code provides that "the provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has

> accepted, or has rejected the plan." 11 U.S.C. § 1327(a). As the Ninth Circuit has held, however, although confirmed plans are *res judicata* to issues therein, the confirmed plan has no preclusive effect on issues that must be brought by an adversary proceeding, or were not sufficiently evidenced in a plan to provide adequate notice to the creditor.

Id. at 154 (internal quotation and citation omitted).

The Second Circuit makes clear, in *Whelton*, that (i) a creditor may properly challenge the enforceability of a plan provision by means of adversary proceeding, (ii) such challenge need not take place under the auspices of 11 U.S.C. § 1127(b) or Fed. R. Civ. P. 60(b) and (iii) the bankruptcy court may properly evaluate the sufficiency of the notice afforded to such creditor in the context of that adversary proceeding. In short, while not specifically reaching the due process issue, the *Whelton* decision confirms, beyond a shadow of a doubt, the procedural propriety of the Photographers' adversary proceeding.

The Otto Entities attempt to distinguish *Whelton* by asserting that (i) the relief sought in *Whelton* "still was a collateral attack on the confirmation order" (*citing Whelton*, 432 F.3d at 153) and (ii) "[h]ence, Rule 60(b), including the time limitation of Rule 60(b), still governed that complaint" *(citing Whelton*, 432 F.3d at 156, n.2). Appellees' Brief at 14-15. The second part of this formulation is an overstatement of the Second Circuit's decision. The first part of this formulation is a misreading so profound as to call into question how it could have been made.

The Second Circuit in no way labeled the creditor's adversary proceeding as a collateral attack on the

plan. *See generally Whelton*. The Otto Entities appear to have lifted this "collateral attack" language out of a portion of the opinion describing a split in the circuits, and summarizing the view of **other** circuits. *See Whelton,* 432 F.3d at 153-54. Worse still, this language summarizes the rule adopted in the Ninth and Tenth Circuits—**a view rejected by the Second Circuit in the *Whelton* case!** *Id.*[5] Thus,

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[5] The relevant passage from *Whelton* follows, with the language represented by the Otto Entities to be Second Circuit authority highlighted in bold:

> [o]ur sister circuits have split in ruling on the validity of student loan discharges obtained by declaration. The Ninth and Tenth Circuits have acknowledged that such a discharge procedure vio-lates the Bankruptcy Code and Rules; nevertheless, these courts have upheld such discharges where a student loan creditor had notice of the declaration's placement in the plan and failed to object. *See, e.g., Great Lakes Higher Educ. v. Pardee (In re Pardee)*, 193 F.3d 1083 (9th Cir. 1999); *Anderson v. UNIPAC-NEBHELP (In re Anderson)*, 179 F.3d 1253 (10th Cir. 1999). In the view of these courts, the creditor's failure to object to a plan or to appeal its confirmation "constitutes a waiver of [its] right to collaterally attack the confirmed plan postconfirmation on the basis that the plan contains a provision contrary to the Code." *In re Pardee*, 193 F.3d at 1085 (internal quotation marks omitted); *accord In re Anderson*, 179 F.3d at 1257-58 (holding that creditor's failure to object or appeal from confirmation of debtor's chapter 13 plan precludes subsequent attack; the plan confirmation is final and constitutes *res judicata* as to all creditors, including those holding student loans).

Whelton, 432 F.3d at 153-54 (emphasis added). The Second Circuit goes on to reject this approach, and to adopt the rule followed by the Fourth, Sixth and Seventh Circuits. *Id.* at 154. The Second Circuit further notes that "the Tenth Circuit and a bankruptcy appellate panel of the Ninth Circuit have apparently retreated somewhat from their former contrary view. *Id.* at 154.

the Otto Entities have cited, as binding Second Circuit precedent, a line from *Whelton* summarizing and rejecting authority from other circuits. To put it mildly, this citation badly misrepresents the *Whelton* case, and in no way supports the untenable assertion that the Second Circuit views adversary proceedings like this case as "collateral attacks" on a plan.

The second part of the Otto Entities' formulation—that the complaint in *Whelton* was governed by Rule 60(b) and the time limitation set forth therein—overstates, and in so doing, misstates the actual language of the Second Circuit's opinion. The actual language is as follows:

> *Whelton* also argues that ECMC's challenge to the discharge was untimely. He notes that the Bankruptcy Code permits revocation of a confirmation order only if the request is made within 180 days of entry of the order, whereas the present action was filed more than two years after confirmation. This action is not, however, an action to revoke a confirmation order, but rather to declare one of the provisions of a confirmed plan void *ab initio*. Accordingly, ECMC was bound only by the "reasonable time" limitations of Rule 60(b)(4), which have been interpreted permissively. *See Beller & Keller v. Tyler*, 120 F.3d 21, 24 (2d. Cir. 1997)("[I]t has been oft-stated that, for all intents and purposes, a motion to vacate a default judgment as void may be made at any time.")(internal quotations omitted).

Id. at 156, n.2.

Viewed in its full context, this language does not suggest that ECMC's challenge was subject to Rule

60, or that this creditor was not entitled to proceed by an adversary proceeding seeking declaratory relief. Indeed, the Second Circuit ultimately affirmed the declaratory judgment entered in ECMC's favor by the bankruptcy court. *Id.* at 152-53, 156. And while the Second Circuit concededly did apply the "reasonable time" limitation codified at Fed. R. Civ. P. 60(b)(4), it did so based upon the fact that ECMC sought to declare a confirmed plan provision void *ab initio*. The Photographers, by contrast, solely seek to declare the Release and Injunction unenforceable against those parties that did not receive constitutionally sufficient notice of these provisions. Finally, the Second Circuit held that the "reasonable time" limitation provided in Rule 60(b)(4) was to be "interpreted permissively." Applying this standard, the Second Circuit found that ECMC's adversary proceeding had been brought timely, even though the complaint was filed over two years after plan confirmation. The Photographers filed their adversary complaint within thirteen months of confirmation—almost twice as quickly as the complaint deemed to be timely filed in *Whelton*.

Simply put, the binding authority of the *Whelton* decision drives a stake through the heart of the supposed procedural deficiencies identified in the Appellees' Brief. The Otto Entities fail to distinguish or minimize the impact of this case in any persuasive way. Taken together with the other authorities cited herein, the *Whelton* decision demonstrates that the Photographers properly proceeded by way of adversary proceeding, and were in no way required to comply with the provisions of 11 U.S.C. § 1127 and Fed. R. Civ. P. 60(b). And, even assuming without conceding that the time limitations set forth in Rule 60(b)(4) are applicable to this case, the *Whelton* decision confirms beyond a shadow of a doubt that (i)

these limitations are to be read "permissively," and (ii) the Photographers filed their Complaint well within the parameters of reasonable timeliness identified by the Second Circuit.

III. THE WELL PLED ALLEGATIONS OF THE PHOTOGRAPHERS' COMPLAINT WERE MORE THAN SUFFICIENT TO SURVIVE DISMISSAL OF THE CASE.

The Photographers properly pled that they were known creditors entitled to actual notice of the Release and Injunction, and that they never received such notice. R-10, ¶¶ 12, 16, 24-26, 31, 34, 63-66. Those well pled allegations should have been more than sufficient to withstand dismissal of the Photographers' underlying constitutional claim. Judge Lifland nevertheless dismissed their Complaint, ruling *inter alia*, that (i) the allegation that they were known creditors was a legal conclusion, which "need not be considered in a light favorable to the Plaintiffs" and (ii) the Photographers did not allege their status as known creditors with sufficient specificity. R-28 at 10-11. The Otto Entities adopt these points in the final section of their brief. *See* Appellees' Brief at 29-39.

In reaching this conclusion, Judge Lifland committed reversible error in two distinct respects. First, he incorrectly characterized as a legal conclusion the Photographers' well pled allegations that they were known creditors. These allegations were classic statements of fact, and entitled to be taken as true for purposes of the Motion to Dismiss. Second, he failed to apply the liberal notice pleading rule codified at

Fed. R. Civ. P. 8(a),[6] instead substituting an apparent fact pleading standard without reason or basis in law. Viewed under the proper legal standards, the Motion to Dismiss should have been denied.

A. The Photographers' Allegation that They Were Known Creditors Presented a Classic Question of Fact.

Contrary to Judge Lifland's ruling, the Photographers' allegation that they were known creditors presents a fact question. *See Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 491 (1988); *Armstrong v. Armstrong*, 130 F.R.D. 449, 452-53 (D. Colo. 1990); *In re Medical Technology, Inc.*, 2006 WL 2519530, at * 10 (Bankr. N.D. Tex. June 26, 2006)(available on Westlaw and attached hereto as Exhibit A); *In re Gencor Industries, Inc.*, 298 B.R. 902, 916-17 (Bankr. M.D. Fla. 2003). In *Tulsa Professional*, the Supreme Court noted that the appellant's status as a known or reasonably ascertainable creditor "cannot be answered on this record," and remanded for a determination on the issue. *Tulsa Professional*, 485 U.S. at 491. Similarly, the district court in *Armstrong* found material factual disputes as to whether certain claimants against the decedent's estate were known or reasonably ascertainable creditors entitled to actual notice. *Armstrong*, 130 F.R.D. at 452-53; *see also Medical Technology*, 2006 WL 2519530, at *10 ("the Court makes no findings as to whether any specific Creditor constitutes an unknown or known Creditor which must be determined on a case-by-case basis").

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[6] Fed. R. Civ. P. 8(a) is made applicable to this adversary proceeding pursuant to Fed. R. Bankr. P. 7008.

The Bankruptcy Court's decision in the *Gencor* case is particularly instructive on this point. The creditors in *Gencor* claimed that the Debtor should have known of their existence because of protracted litigation between them (several years prior to the petition date), as well as prior correspondence concerning potential infringement claims (several years prior to the petition date). *Gencor*, 298 B.R. at 913-14. For its part, the Debtor argued that the creditors were unknown claimants, and that the Debtor could not be expected to remember a demand letter written four years previously. *Id.* at 914. The bankruptcy court ultimately found a material factual dispute as to whether the creditors were known or unknown claimants:

> [t]he Court cannot determine whether the defendants were known or unknown creditors or whether Gencor made a reasonably diligent search to identify the defendant's claims. Nor can the Court assess whether, even if the defendants were unknown creditors, Gencor made any attempt to provide the required publication or constructive notice or whether the defendants had actual knowledge of the claims bar date. Given the fact that their sister corporation, CMI Terex, had knowledge of the claims bar date, it certainly is possible that these remaining two defendants also had notice. If there are genuine issues as to any material facts, summary judgment should not be granted. Therefore, the Court denies both parties' cross motions for summary judgment on the issue of whether the defendants' claims are subject to the discharge injunction.
>
> To resolve the remaining issue raised in this adversary proceeding, **the Court will conduct an**

> **evidentiary hearing to determine whether Gencor knew of the defendants' claim** at the time Gencor completed its schedules, whether Gencor could have discovered the defendants' claim through a reasonably diligent search or whether Gencor could reasonably have believed that the defendants had abandoned its claim, and whether the defendants had actual knowledge of the claims bar date . . . .

Gencor, 298 B.R. at 917 (emphasis added).

The *Gencor* decision underlines the point that a determination of whether a party is a known creditor presents questions of fact that should be resolved through an evidentiary hearing. Because that hearing may turn on the credibility and state of mind

of the witnesses, none of the foregoing decisions attempted to resolve these questions on summary judgment. Indeed, the Supreme Court acknowledged in Tulsa Professional that the record before the Court was insufficient to make this determination. *Tulsa Professional*, 485 U.S. at 491. A fortiori, this determination should not be made on a motion to dismiss, where there has been no record development, and where the well pled allegations of the Complaint must be taken as true.

The authorities cited by the Otto Entities do not change this analysis. *See* Appellees' Brief at 32 ("the Photographers fail to address case law consistently holding that whether an entity is a "known" creditor is a legal conclusion"). While the absence of jump cites makes it difficult to pinpoint the precise passages relied upon by the Otto Entities, with one exception (which will be discussed below), the cases cited by the Otto Entities do not appear to provide

any support for the argument that known creditor status presents a question of law. *See Tulsa Professional*, 485 U.S. at 491 (court remands for a determination as to whether creditor was known or reasonably ascertainable); *In re Texaco Inc.*, 182 B.R. 937, 954-57 (Bankr. S.D.N.Y. 1995)(following evidentiary hearing, court **finds as a fact** that Texaco had no reason to know the Sanders were prospective claimants; court **finds as a matter of fact and law** that the Sanders were unknown creditors who were properly served via publication notice)(emphasis added)[7]; *In re Best Products Co., Inc.*, 140 B.R. 353, 356-60 (Bankr. S.D.N.Y. 1992)(unknown creditors not permitted to file late claim; opinion does not reflect any effort by the creditors to establish or prove they were known creditors); *In re Brooks Fashion Stores*, Inc., 124 B.R. 436, 442-45 (Bankr. S.D.N.Y. 1991) (court finds, on Debtor's motion for summary judgment, that state agency was not a known creditor).

Only one case cited by the Otto Entities supports the proposition that a claimant may be ruled an "unknown creditor" in the context of motion to dismiss—*In re U.S.H. Corp. of New York*, 223 B.R. 654 (Bankr. S.D.N.Y. 1998)(Lifland, J.). In the *U.S.H.* case, Judge Lifland dismissed a complaint filed by a group of homeowners, seeking an order (i) determining that they were not bound by the Debtor's confirmed plan of reorganization and (ii) authorizing them to pursue their pre-bankruptcy claims against the Debtor. *Id.*, 223 B.R. at 656. In so ruling, Judge

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[7] The finding of law in this case appears to relate to the court's conclusion that publication notice was sufficient where directed to an unknown creditor. This reading is bolstered by the statement a page earlier, wherein the court finds as a matter of fact that the Sanders were unknown creditors.

Lifland concluded that the plaintiffs were not entitled to prove their allegation that they were known creditors of the Debtor:

> [g]iven the pleadings and arguments presented to this court, there are no set of facts under which I could find the Plaintiffs were known creditors of U.S. Home before or at the time of confirmation. The Plaintiffs do not counter the crucial contention pled and affirmed by affidavit by U.S. Home, that there is no building code, standard or law which required U.S. Home to build according to CAT-POOL standards. Without the linchpin of a duty of U.S. Home to build in accordance with CAT-POOL standards, U.S. Home could not have been expected to discover any potential claim of the Plaintiffs prior to confirmation, particularly one so remote. It was not the duty of U.S. Home to search out each conceivable or possible creditor. If the Plaintiffs were to be considered known creditors at the time of the confirmation, the universe of creditors entitled to actual notice would defeat the purpose of title 1 1's expedited and cost effective claims resolution process.
>
> Given the facts presented to the court it is absurd for Plaintiffs to attempt a demonstration at trial that they were "known" creditors, and thus should not be bound by the Confirmation Order and discharge provisions of the Plan and Bankruptcy Code.

Id., 223 B.R. at 660 (internal citations and footnotes omitted).

The Photographers respectfully submit that this decision is neither well reasoned nor binding upon

this Court, and should not be followed. In all of the other cases cited on this point by both parties, the court only determines known creditor status on a fully developed record. The Supreme Court remanded the *Tulsa Professional* case for this very reason. *See Tulsa Professional*, 485 U.S. at 491. Likewise, the district court in *Armstrong* found material factual disputes on this point; while the bankruptcy court in Gencor confirmed it could not decide the issue without an evidentiary hearing. *See Armstrong*, 130 F.R.D. at 452-53; *Gencor*, 298 B.R. at 917. By deciding the issue on a motion to dismiss, Judge Lifland deprived the plaintiffs of the opportunity to prove their well pled allegations, while relying upon an affidavit from the Debtor. *U.S.H.*, 223 B.R. at 660. In addition to the fact that an affidavit has no place in the briefing of a motion to dismiss, it appears that Judge Lifland accepted the allegations of the Defendant Debtor as true, while disregarding or discounting the allegations of the Plaintiff homeowners. In so doing, he turned the standard for reviewing a motion to dismiss on its head.

Moreover, Judge Lifland appears to have based his conclusion that the homeowners were unknown creditors on his supposition that, "[w]ithout the linchpin of a duty of U.S. Home to build in accordance with CAT-POOL standards, U.S. Home could not have been expected to discover any potential claim of the Plaintiffs prior to confirmation, particularly one so remote." *Id.* But this supposed connection between duty and knowledge makes no sense. One can easily envision the Debtor learning of a putative claim based upon the breach of a non-existent legal duty. And one can also envision the Debtor not being made aware of a claim founded on the breach of a well-established legal duty. Simply stated, duty and

knowledge are wholly separate and distinct concepts, and the presence or absence of a legal duty is wholly irrelevant to whether the party claiming a breach of that duty is a known creditor.

Perhaps most tellingly, Judge Lifland states in *U.S.H.* that "it is absurd for Plaintiffs to attempt a demonstration at trial that they were "known" creditors." *Id.* This statement confirms that, on a motion to dismiss, Judge Lifland tested the ultimate evidentiary merits of the claim, and found them lacking. But that ultimate determination should only have been made following a comprehensive summary judgment briefing (with a meaningful opportunity for discovery), or an evidentiary hearing. Because the *U.S.H.* decision was made on an incomplete and one-sided record, it should not be deemed persuasive authority for the proper resolution of the instant motion to dismiss.

B. The Photographers' Statement of Their Claim Was More Than Sufficient for Federal Notice Pleading Standards.

In his order granting the Motion to Dismiss, Judge Lifland found that the Photographers' allegations were insufficient, owing to their failure to allege that "a proper examination of the books and records would have uncovered their claim." R-28 at 11, *citing In re U.S.H. Corp. of New York*, 223 B.R. 654 (Bankr. S.D.N.Y. 1998).[8] This formulation of the known creditor test is unduly narrow, and is based primarily on a conclusion reached in the *U.S.H.* case without citation to other authority. *U.S.H.*, 223 B.R. at 659. The Supreme Court has held that actual notice is

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[8] The Otto Entities also adopt this theme in the last section of their brief. Appellees' Brief at 34-39.

required for known or reasonably ascertainable creditors. *See Tulsa Professional*, 485 U.S. at 490 (emphasis added). A creditor might be reasonably ascertainable, yet not listed in the Debtor's books and records. *See Fogel v. Zell*, 221 F.3d 955, 963 (7th Cir. 2000).

For example, in *Fogel*, the City of Denver sought to challenge an injunction barring it from suing Samuel Zell and certain of his affiliates. *Id.*, 221 F.3d at 958. The Seventh Circuit held that Denver had not received constitutionally sufficient notice of the settlement implementing the injunction. *Id.* at 966. In so ruling, the Seventh Circuit decisively rejected the contention that Denver was an unknown claimant:

> [t]his is a multimillion dollar bankruptcy, the potential claimants were all purchasers of a product manufactured by the debtor's predecessor, and Denver in particular was a large purchaser. (We don't know what I paid, but we know that it bought and installed at least five miles of Interpace pipe.). Other pipe claimants had filed multimillion claims. The suggestion that the trustee could not have discovered that Denver had purchased a large quantity of the defective pipe strikes us as risible.

Id. at 963.

In *Fogel*, the Seventh Circuit rightly acknowledged the possibility that a claimant could become known through its overall course of dealing in the marketplace, as well as its prior transactions with the Debtor. It therefore makes no sense to require the Photographers to plead that their claims would have been disclosed by a review of the Debtor's books and records. This requirement is narrower than the requirements set forth in the controlling Supreme

Court cases, and could rule out many other ways in which their claims could become known to the Otto Entities.

Even more to the point, the Photographers have pled their status as known creditors with all the specificity required by the Federal Rules of Civil Procedure. *See Conley v. Gibson*, 355 U.S. 41, 47-48 (1957). As the Supreme Court has made plain,

> . . . the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 47; *see also Wynder v. McMahon et al.*, 360 F.3d 73, 76-77 (2d Cir. 2004)(more extensive pleading of the facts is not required under Rule 8(a) because the Federal Rules provide other devices besides pleadings to define the facts and issues).

The Photographers have alleged, *inter alia*, that (i) they were never given any notice that relief would be sought against them in the Spiegel bankruptcy case (R-10, ¶ 12), (ii) they were never given notice of the release contained in Spiegel's plan (¶ 16), (iii) the complaint filed by Peter Rosenbaum Photography Corp. in Illinois put Spiegel and the Otto Entities on notice that there were outstanding claims against them related to numerous photographs utilized by

the Otto Entities, including those taken by the Photographers (¶ 21), (iv) the Photographers were known creditors of Spiegel, and parties to an agreement with Spiegel (¶ 24), (v) the Otto Entities knew or should have known that the plan granted relief for their benefit and against the Photographers, and that the Photographers were therefore entitled to notice of such relief (¶25), (vi) the Photographers did not receive notice of the plan and disclosure statement or the release contained therein (¶ 26), (vii) the Otto Entities and Spiegel were aware that liability had been asserted with respect to unauthorized use of copyrighted photographs (¶ 31), (viii) the plan and disclosure statement were not served upon the Photographers, notwithstanding that they knew or should have known their requested release purported to grant relief against the Photographers (¶ 34), (ix) the Otto Entities knew or should have known that they were seeking relief against the Photographers (¶ 63), (x) the Photographers were known entities entitled to actual notice of the plan and disclosure statement, as well as the proposed entry of the release (¶ 64), (xi) the Otto Entities and Spiegel failed to provide the Photographers with such actual notice (¶65) and (xi) the failure to give actual notice to the Photographers violated their rights of procedural and substantive due process, and rendered the release unenforceable as it pertains to the Photographers (¶ 66). These allegations are detailed, specific and more than sufficient to state a claim under Fed. R. Civ. P. 8 (a). It was reversible error to require further detail, or otherwise to deem these allegations insufficient.

CONCLUSION

Under well established federal practice and procedure, a plaintiff need only allege facts sufficient to put the defendant on notice of his claim. The Photographers more than met this burden in their initial Complaint. The well pled facts set forth in the Complaint state a claim that the Photographers were denied due process, and that the Release and Injunction therefore may not be enforced against them. By dismissing the Complaint, the Bankruptcy Court held the Photographers to a standard beyond that set forth in Rule 8(a), ignored the well pled facts of their Complaint, and imposed the facially inapplicable requirements of 11 U.S.C. § 1127(b) and Fed. R. Civ. P. 60(b). All of these rulings were in error, and should be overturned. The order granting the Motion to Dismiss should be reversed, and the Otto Entities should be directed to answer the Complaint within ten days of such reversal.

Respectfully submitted,

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